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By LAWRENCE ALLEN KATZ*

Introduction

Title VII of the Civil Rights Act of 1964,[1] a legislative enactment designed to prohibit discrimination in employment on the grounds of race, color, religion, sex, or national origin, was the product of many compromises.[2] One particularly significant compromise which facilitated passage of the act was the agreement to minimize the enforcement powers of the Equal Employment Opportunity Commission (EEOC), the agency responsible for the administration of Title VII. The original act authorized the EEOC to seek compliance with the statute by nudging adverse parties into voluntary settlements.[3] By 1971, the enforcement machinery of the act had "proven to be seriously defective in providing an effective Federal remedy for violations of Title VII,"[4] and

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1. 42 U.S.C. §§ 2000e to e-17 (1970 & Supp. V, 1975).

2. *See generally* Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966).

3. *See id.* at 450-52; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1195-97, 1228-41 (1971) [hereinafter cited as *Developments*]; Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 432 (1965); 1975 UTAH. L. REV. 264, 271.

4. S. REP. No. 415, 92d Cong., 2d Sess. 4 (1971). Although private parties could file suit on their own behalf, few complainants had the means to undertake such a task. As a result, lawsuits were instituted in fewer than 10% of the cases in which the EEOC had failed to achieve conciliation. *Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess., at 40 (1969) (statement of William H. Brown III, Chairman, EEOC).

stronger provisions granting more power to the EEOC were recommended.[5] As a result of further compromises in Congress, the first substantial amendments to Title VII were enacted in March 1972.[6]

The 1972 amendments did not authorize the EEOC to hold hearings or to issue cease and desist orders as many had advocated.[7] On the other hand, they did grant to the commission authority to institute lawsuits on behalf of aggrieved persons and to obtain appropriate relief.[8] The active exercise of this power[9] has made the EEOC a formidable antidiscrimination force.[10] Because the cost of litigating against the commission is so high and the potential liability is so great,[11] the

5. *See, e.g., Developments, supra* note 3, at 1269-75; *Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvement*, 5 COLUM. J.L. & SOC. PROB. 1, 51-60 (1969). *See generally* H.R. REP. No. 238, 92d Cong., 1st Sess. 2 (1971).

6. Act of March 24, 1972, Pub. L. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to e-17 (Supp. V, 1975)).

7. *See, e.g.*, S. REP. No. 415, 92d Cong., 2d Sess. 20 (1971); H.R. REP. No. 238, 92d Cong., 1st Sess., 1, 8-11 (1971); *Developments, supra* note 3, at 1271-72; *Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvement*, 5 COLUM. J.L. & SOC. PROB. 1, 52-54 (1969). Many still advocate giving cease and desist powers to the EEOC. In 1975, for example, the annual report of the U.S. Civil Rights Commission recommended creation of a National Employment Rights Board vested with authority to issue cease and desist orders reviewable in the federal appellate courts. 2 CCH EMPL. PRAC. GUIDE ¶ 5340, at 3663 (1975).

8. 42 U.S.C. §§ 2000e-5(f) to (g) (Supp. V, 1975).

9. The EEOC has established regional litigation centers in Philadelphia, Atlanta, Chicago, Denver and San Francisco. 8 EEOC ANN. REP. 19 (1973). In the fiscal year ending June 30, 1973, the commission filed 116 lawsuits. *Id.* In fiscal 1974, it filed 145 suits; in fiscal 1975, 318 suits; and in the first nine months of fiscal 1976, 307 suits. BNA EEOC COMPLIANCE MANUAL, *Summary of Recent Developments*, No. 7, at 1 (1976). In its second year under the new amendments, the EEOC's General Counsel authorized staff increased from 422 to 538, a growth rate of nearly 30%. *Compare* 8 EEOC ANN. REP. 30 (1973), *with* 9 EEOC ANN. REP. 29 (1974).

10. The EEOC is not the only such force faced by the employer. He may also have to contend with rigorous investigations by other agencies of the federal and state government and, if his employees are represented by a union, with arbitration in which the grievant alleges breach of the discrimination clause of the labor contract. Neither the EEOC nor the complainant is bound by the results of these proceedings. The employer, on the other hand, faces exposure to substantial financial liability in each forum. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974); United States v. Sweet Home Cent. School Dist., 407 F. Supp. 1362, 1366 (W.D.N.Y. 1976) (under Title VII "[r]epetitive investigations are envisioned"). The U.S. Civil Rights Commission has recommended creation of a single federal agency to hear and determine all discrimination complaints except those involving only individual charges, which would be referred to approved state and local agencies. 2 CCH EMPL. PRAC. GUIDE ¶ 5340, at 3664 (1975).

11. Back pay liability may accrue for as long as two years prior to the filing of the charge with the EEOC. 42 U.S.C. § 2000e-5(g) (Supp. V, 1975). The average time for the EEOC to process charges has been as long as twenty-six months. *See* 9 EEOC

employer is extremely vulnerable to EEOC settlement pressure during the processing of a charge under Title VII.[12]

The commission's capacity to institute lawsuits has undoubtedly increased its credibility with employers and has substantially augmented its ability to investigate and conciliate charges of discrimination. Moreover, the courts have shown a pronounced tendency to construe the statute as vesting broad investigative powers in the commission.[13] Accordingly, the employer must deal with EEOC representatives in a manner which is both cooperative and defensive. The role of the EEOC investigator is theoretically a neutral one; in reality, however, the adversary process begins with the filing of the charge. The employer who fails to recognize this fact will eventually learn that, procedurally, he has been burning bridges behind him.

ANN. REP. 8 (1974). A lawsuit might not be filed for several months thereafter. Thus, back pay liability can easily accumulate for four to six years before a judgment is finally entered in a court action. This period of time can be increased if the EEOC delays filing suit, since Title VII does not contain a statute of limitations applicable to the EEOC. *See* EEOC v. Occidental Life Ins. Co., 535 F.2d 533, 536 n.5 (9th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3101 (U.S. July 23, 1976) (No. 76-99). A small minority of courts have dismissed, on the ground of laches, EEOC suits instituted an unreasonably long time after the charge was filed. *See, e.g.*, EEOC v. Moore Group, Inc., 11 CCH Empl. Prac. Dec. ¶ 10,886 (N.D. Ga. Mar. 25, 1976) (five year delay); EEOC v. J.C. Penney Co., 11 CCH Empl. Prac. Dec. ¶ 10,661 (N.D. Ala. 1975) (four year delay); *cf.* EEOC v. South Carolina Nat'l Bank, 11 CCH Empl. Prac. Dec. ¶ 10,932 (D.S.C. 1976) (four year delay in issuing investigative subpoena warrants denial of enforcement). Other courts have barred back pay claims because of the EEOC's delay in filing suit. *E.g.*, EEOC v. American Mach. & Foundry, Inc., 12 CCH EMPL. PRAC. DEC. ¶ 11,200 at 5524-25 (M.D. Pa. Aug. 26, 1976).

12. The EEOC has achieved some staggering settlements since the 1972 amendments were enacted. In its first year under the amendments, the commission negotiated an agreement with the American Telephone and Telegraph Company which included a $15 million payment to minority personnel. 8 EEOC ANN. REP. 27 (1973). In its second year under the amendments, the EEOC obtained a $31 million settlement from nine steel companies and the United Steelworkers of America, and an additional $30 million settlement from AT&T. 9 EEOC ANN. REP. 7 (1974). In August 1976, the commission announced settlement of charges against Gulf Oil Company, including a payment of $935,000 to 640 employees. CCH LAB. L. REP. No. 114, at 4 (Aug. 5, 1976). The EEOC's new enforcement powers obviously provide greater incentive for employers to conciliate discrimination charges. "In the first quarter of FY 1973 the Commission was successful in approximately 25 percent of its attempted conciliations; by the second quarter of FY 1974, the success rate had climbed to nearly 50 percent." 9 EEOC ANN. REP. 1 (1974). Indeed, the EEOC has been criticized for utilizing "legal blackmail" to obtain unreasonable settlements. Bleiberg, *Liberty or License? EEOC Evidently Opts for the Latter*, Barron's, May 31, 1976, at 7, col. 4.

13. *See, e.g.*, Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970); EEOC v. United States Fidelity & Guar. Co., 11 CCH Empl. Prac. Dec. ¶ 10,935 (D. Md. May 4, 1976).

This article will analyze and evaluate the employer's legal position and his procedural rights in an EEOC investigation of discrimination charges and in the commission's conciliation efforts. To a great extent the employer's rights are a function of the limitations imposed upon the EEOC by the statute and by the agency's own regulations.[14] It is in the employer's interest to be aware of these restrictions on the commission's power and to assert his rights when appropriate.[15] By so doing, the employer will increase his chances for a favorable resolution of the charge and may avoid an unnecessarily costly settlement.

The Charge

The first step an employer should take when an EEOC investigation begins is to determine whether the commission has jurisdiction of the charge. The threshold inquiry is whether there is an appropriate charging party. The EEOC's jurisdiction is properly invoked only when a charge of discrimination is filed by an "aggrieved" individual, by someone acting on his behalf, or by one of the commissioners.[16] The objections of one who is merely a "concerned citizen" are insufficient.[17] It is not necessary, however, that the aggrieved person be an employee of the respondent-employer[18] or that he have applied for a job with

14. Fulfillment of various procedural requirements is a condition precedent to an EEOC lawsuit. EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 947-48 (8th Cir. 1974).

15. *See, e.g.*, EEOC v. Air Guide Corp., 539 F.2d 1038 (5th Cir. 1976) (failure to issue timely notice of charge); EEOC v. Hickey-Mitchell Co., 507 F.d 944 (8th Cir. 1974) (failure to notify employer of opportunity to reopen conciliation discussions); Veazie v. Southern Greyhound Lines, 374 F. Supp. 811 (E.D. La. 1974) (failure to notify employer that reasonable cause determination was being reconsidered). In most cases, the employer's assertion of procedural rights under Title VII will be made when he opposes an EEOC subpoena or lawsuit, but in some circumstances (*e.g.*, lengthy EEOC delays) the employer may wish to institute legal action himself. The employer cannot sue the EEOC under Title VII because he is not a person "aggrieved" by an unlawful employment practice within the meaning of the act. However, the employer may be able to maintain a suit against the EEOC for violation of its regulations under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970), or under the mandamus statute, 28 U.S.C. § 1361 (1970). *See* Steward v. EEOC, 12 CCH EMPL. PRAC. DEC. ¶ 11,152 (N.D. Ill. Aug. 9, 1976); Pima County Comm. College Dist. v. EEOC, 11 CCH Empl. Prac. Dec. ¶ 10,867 (D. Ariz. Apr. 7, 1976). The respondent might also be able to recover attorney's fees when the EEOC institutes a procedurally defective suit. Van Hoomissen v. Xerox Corp., 503 F.2d 1131, 1132 (9th Cir. 1974); EEOC v. Western Elec. Co., 10 CCH Empl. Prac. Dec. ¶ 10,370 (D. Md. 1975).

16. 42 U.S.C. §§ 2000e-5(b), (d) (Supp. V, 1975); 29 C.F.R. §§ 1601.6, .10 (1975).

17. EEOC Dec. No. 75-006, 2 CCH EMPL. PRAC. GUIDE ¶ 6460 (1974); EEOC Dec. No. 74-80, 2 CCH EMPL. PRAC. GUIDE ¶ 6421 (1974).

18. Sibley Memorial Hosp. v. Wilson, 488 F.2d 338 (D.C. Cir. 1973). An independent contractor, however, cannot raise Title VII claims against the person for

the respondent.[19] It is enough that the charging party demonstrate a real, present interest in a job and the existence of an unlawful deterrent to employment.[20]

An individual has standing to maintain a charge only if he was *personally* aggrieved by a discriminatory employment practice. Thus, a Caucasian would lack standing to allege discrimination against Blacks,[21] and a Black could not complain of discrimination against Hispanics.[22] However, a minority employee may have standing to challenge his employer's discriminatory treatment of other members of the employee's racial or ethnic group on the ground that his own opportunities and psychological well-being are adversely affected by such treatment.[23] Similarly, a Caucasian might be able to establish standing to contest an employer's unlawful discrimination against minorities because it has a detrimental impact on *his* psychological well-being by creating an unpleasant work environment.[24]

The EEOC regulations specify the content of the charge, including a requirement that it be made under oath,[25] but these rules are generally

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whom he provides services. Mathis v. Standard Brands Chem. Indus., 10 CCH Empl. Prac. Dec. ¶ 10,306 (N.D. Ga. 1975).

19. Hailes v. United Airlines, 464 F.2d 1006 (5th Cir. 1972).

20. *Id.* the employment from which the complainant was deterred can be with someone other than the respondent-employer. *See, e.g.*, Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973); Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974).

21. EEOC v. Quick Shop Mkts., Inc., 396 F. Supp. 133, 135 (E.D. Mo. 1975), *aff'd*, 10 CCH Empl. Prac. Dec. ¶ 10,519 (8th Cir. 1975).

22. EEOC v. United States Fidelity & Guar. Co., 11 CCH Empl. Prac. Dec. ¶ 10,935, at 7961-62 (D. Md. May 4, 1976), *aff'd*, 12 CCH EMPL. PRAC. DEC. ¶ 11,017 (4th Cir. June 29, 1976).

23. Gray v. Greyhound Lines, 12 CCH EMPL. PRAC. DEC. ¶ 11,211, at 5580 (D.C. Cir. Oct. 13, 1976); *see* Gamble v. Birmingham S.R.R., 514 F.2d 678, 687-88 (5th Cir. 1975); Circle K Corp. v. EEOC, 501 F.2d 1052, 1054 (10th Cir. 1974); Graniteville Co. v. EEOC, 438 F.2d 32, 35-37 (4th Cir. 1971). A complainant's standing to maintain a lawsuit challenging employment practices which have not directly injured him is less certain than his ability to instigate an EEOC investigation of such practices. *See* Doctor v. Seaboard Coast Line R.R., 12 CCH EMPL. PRAC DEC. ¶ 11,037, at 4832 (4th Cir. 1976) (plaintiff who did not transfer to another department cannot complain of transferees' discriminatory loss of seniority); Causey v. Ford Motor Co., 516 F.2d 416, 421 (5th Cir. 1975) (new hire cannot challenge recruitment program).

24. *See, e.g.*, Waters v. Heublein, Inc., 12 CCH EMPL. PRAC. DEC. ¶ 11,238 (9th Cir. Nov. 12, 1976); *cf.* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (employee may challenge employer's treatment of customers); *See also* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (White tenant of apartment has standing to challenge landlord's discrimination against Black applicants for housing).

25. 29 C.F.R. §§ 1601.8, .11 (1975).

considered to be administrative conveniences and technicalities. As such, they may be waived by the EEOC or cured by subsequent amendments.[26] The judiciary has taken the view that, because of the paternalistic nature of the statute, an individual's failure to comply with technical requirements in the original charge does not warrant dismissal of a subsequent lawsuit.[27]

The commission has jurisdiction only over charges which are *timely* filed. To be timely, a charge must be filed within 180 days of the unlawful employment practice, except in those cases where the individual has filed the charge with the appropriate state or local agency.[28] In such a case, the charging party obtains the benefit of an extended time limit under Title VII and may file with the EEOC within three hundred days of the unlawful practice or within thirty days after receiving notice that the state or local agency has terminated proceedings in the matter, whichever is earlier.[29] If the complainant fails to file a timely state

26. *Id.* § 1601.11(b). "A generalized plea for assistance addressed to the commission is enough to justify the intake of a charge." CCH EEOC COMPLIANCE MANUAL § 2.1(c) (1976); *see* Russell v. American Tobacco Co., 528 F.2d 357, 364 (4th Cir. 1975), *cert. denied*, 96 S. Ct. 1666 (1976) (unsworn charge does not warrant later dismissal of suit); Anderson v. Methodist Evangelical Hosp., 464 F.2d 723, 724-25 (6th Cir. 1972) (untimely charge is made timely by relation back to earlier unsworn charge); Georgia Power Co. v. EEOC, 412 F.2d 462, 466-67 (5th Cir. 1969) (letter is adequate charge); Mack v. General Elec. Co., 329 F. Supp. 72, 77 (E.D. Pa. 1971) (copy of petition to President of United States protesting company's policies is valid charge); *cf.* Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972) (open letter to public is not valid charge); EEOC v. Appalachian Power Co., 13 CCH EMPL. PRAC. DEC. ¶ 11,293 (W.D. Va. Sept. 10, 1976) (suit dismissed for commissioner's failure to swear to charge). "Anonymous charges are not to be processed." CCH EEOC COMPLIANCE MANUAL § 2.4 (1976); *see* Jones v. Holy Cross Hosp., 64 F.R.D. 586, 589 (D. Md. 1974). The commission's stated policy is to close any file where the charging party cannot be located during the investigation. CCH EEOC COMPLIANCE MANUAL § 8.5(c) (1976). One of the commissioners could, of course, file his own charge based on information received from anonymous sources. *See* EEOC v. Occidental Life Ins. Co., 535 F.2d 533, 542 (9th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3101 (U.S. July 23, 1976) (No. 76-99); 29 C.F.R. § 1601.5 (1975).

27. *See, e.g.*, Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

28. 42 U.S.C. § 2000e-5(e) (Supp. V, 1975).

29. *Id.* If the charge is filed with the EEOC first, the commission must defer the charge to the state or local agency with appropriate jurisdiction for sixty days. 42 U.S.C. § 2000e-5(c) (Supp. V, 1975); 29 C.F.R. § 1601.12 (1975). Even charges filed by one of the commissioners must be deferred to the state agency before the EEOC can assert jurisdiction. 29 C.F.R. § 1601.10 (1975); Motorola, Inc. v. EEOC, 460 F.2d 1245 (9th Cir. 1972). An oral referral to the state agency by the EEOC will satisfy this requirement. Love v. Pullman Co., 404 U.S. 522, 525 (1972); *cf.* Faraci v. Hickey-Freeman Co., 404 F. Supp. 1229 (W.D.N.Y. 1975) (letter to state agency satisfies requirement even if agency does not accept letter as complaint). If the state does not prohibit the particular employment practice which is the subject of the charge, or does

charge, he should not be entitled to the extended EEOC filing period, since he has defeated, not satisfied, the congressional intent that local authorities have the first opportunity to resolve claims of discrimination.[30]

There has been considerable judicial confusion regarding the relationship between the state and federal statutes of limitation and the extent of the complainant's obligation to seek relief from the state agency before turning to the EEOC. The statute clearly contemplates prior resort to the state remedy[31] but offers little guidance with respect to conflicts in timing. The courts, however, have consistently construed the act in favor of the complainant. Thus, although Title VII appears to require that all charges of discrimination be filed *somewhere* within 180 days, it has been held that the charging party need not file his complaint within 180 days if the state allows more time and the charge is filed with the state within the state limitations period.[32] Where the state statute of limitations is less than 180 days, a timely Title VII charge will not be barred on the grounds that it was not timely filed with the state agency.[33] Furthermore, it has been held that the EEOC's failure to

not afford an adequate remedy, deferral is unnecessary. EEOC v. United States Fidelity & Guar Co., 10 CCH Empl. Prac. Dec. ¶ 10,549 (D. Md. 1975), *aff'd*, 12 CCH EMPL. PRAC. DEC. ¶ 11,017 (4th Cir. June 29, 1976); Hankeson v. Ohio Bureau of Empl. Serv., 8 CCH Empl. Prac. Dec. ¶ 9804 (N.D. Ohio 1974); Donohue v. Shoe Corp. of America, 337 F. Supp. 1357 (C.D. Cal. 1972).

30. *See* Dubois v. Packard Bell Corp., 470 F.2d 973, 974 (10th Cir. 1972); Anderson v. Port Authority, 11 CCH Empl. Prac. Dec. ¶ 10,799 (W.D Pa. Feb. 12, 1976) (grievance proceeding is not equivalent to state filing); *cf.*, Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1233 (8th Cir. 1975). *But see* Ortega v. Construction Laborers Local 390, 396 F. Supp. 976, 982 (D. Conn. 1975) (complainant entitled to extended federal time period because state accepted untimely claim). In *Ortega* the court stated that had the state agency dismissed the complainant's untimely charge, the complainant would have had the additional 30 days allowed by the act for filing with the EEOC, despite the fact that the 180 day statutory period had expired. *Id.* The EEOC has taken the same position. EEOC Dec. No. 70-007, CCH EEOC DEC. ¶ 6143 (1973); EEOC Dec. No. 70-43, CCH EEOC DEC. ¶ 6058 (1973). This construction of the law is patently wrong because it means that a complainant's otherwise untimely EEOC charge can be made timely by filing of an untimely state charge. A complainant should not be able to "institute" a state proceeding within the meaning of Title VII without a timely state charge. *See* Dubois v. Packard Bell Corp., *supra* at 975.

31. 42 U.S.C. § 2000e-5(c) (Supp. V, 1975). Prior submission of the charge to the state agency is a jurisdictional prerequisite to a suit under Title VII. Mosley v. McKee-Wellman Power Gas, 12 CCH EMPL. PRAC. DEC ¶ 11,141 (9th Cir. 1976). The district court need not dismiss the complaint for nondeferral, however; it may retain jurisdiction and remand for compliance. *Id.*

32. Doski v. M. Goldseker Co., 12 CCH EMPL. PRAC. DEC. ¶ 11,051, at 4900-02 (4th Cir. 1976).

33. Davis v. Valley Distrib. Co., 522 F.2d 827, 832-33 (9th Cir. 1975), *petition for*

defer a charge to the state agency[34] can be corrected after suit has been instituted even though the state statute of limitations has run and the state agency lacks jurisdiction to accept the charge.[35]

Prior to 1974, a number of courts had held that submission of a discrimination claim to an arbitrator pursuant to a labor contract tolled the running of Title VII's statute of limitations pending completion of the abritration proceedings.[36] The United States Supreme Court's decisions in *Alexander v. Gardner-Denver Co.*[37] and *Johnson v. Railway Express Agency, Inc.*[38] seem to have invalidated those cases. In *Alexander*, the Court ruled that arbitration and Title VII offered independent and distinct remedies to a complainant.[39] A year later, in *Johnson*, the Court issued a similar ruling with respect to the Civil Rights Act of 1866[40] and Title VII and further held that filing a complaint under the latter did not toll the statute of limitations applicable to the former.[41] Finally, in December 1976, the Court applied the *Johnson* rationale in holding that submission of a discrimination claim to arbitration would not toll the statute of limitations under Title VII.[42] The statute

cert. filed, 45 U.S.L.W. 3050 (U.S. Dec. 13, 1975) (No. 75-836); Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1232 (8th Cir. 1975). To allow such a bar would give the states effective control over the timeliness of Title VII complaints.

34. See note 29 *supra*.

35. Mosley v. McKee-Wellman Power Gas, 12 CCH EMPL. PRAC. DEC. ¶ 11,141 (9th Cir. 1976). *See also* Cook v. Mountain States Tel. & Tel. Co., 397 F. Supp. 1217, 1222-23 (D. Ariz. 1975). Presumably, if the state agency declines to accept jurisdiction of the untimely charge, the plaintiff, having belatedly satisfied the deferral requirement, will continue with his suit. *But cf.* Ortega v. Construction & Gen. Laborers' Union, 396 F. Supp. 976, 982 (D. Conn. 1975) (the state agency accepted the untimely charge). The matter is further complicated because according to its own regulations the EEOC will not defer charges which would be untimely under state law. 29 C.F.R. § 1601.12(b)(1)(v) (1975). If the EEOC itself is the plaintiff, a failure to properly defer may be treated more seriously. *See* EEOC v. Appalachian Power Co., 13 CCH EMPL. PRAC. DEC. ¶ 11,293 (W.D Va. Sept. 10, 1976) (suit dismissed where commissioner's charge not under oath).

36. Moore v. Sunbeam Corp., 459 F.2d 811, 827 (7th Cir. 1972); Malone v. North Am. Rockwell Corp., 457 F.2d 779, 781 (9th Cir. 1972); Hutchings v. United States Indus. Inc., 428 F.2d 303, 308-09 (5th Cir. 1970); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

37. 415 U.S. 36 (1974).

38. 421 U.S. 454 (1975).

39. 415 U.S. at 47-49. A complainant's right to pursue his Title VII remedies will not be affected by the receipt of an adverse decision from the arbitrator, although the decision may "be admitted as evidence [in a lawsuit under Title VII] and accorded such weight as the court deems appropriate." *Id.* at 60.

40. 42 U.S.C. § 1981 (1970).

41. 421 U.S. at 462-67.

42. Electrical Workers Local 790 v. Robbins & Meyers, Inc., 45 U.S.L.W. 4068 (U.S. Dec. 20, 1976).

might be tolled, however, by a timely filing in another forum authorized to consider Title VII claims, such as a government agency which reviews complaints that affirmative action plans have been violated.[43]

The courts have consistently held that the statute of limitations is tolled while a discriminatory act is continuing, but they have frequently disagreed on the definition of "continuing act."[44] The controlling factor in distinguishing a continuing from a noncontinuing act often seems to be the artfulness displayed in drafting the charge. A charge alleging a discriminatory failure to recall, for example, may be maintained while a charge based on the original layoff would be untimely.[45] Although a refusal to hire would certainly appear to be a single, noncontinuing act,[46] some courts have held that it is continuing if the charging party alleges that his rejection was part of "an ongoing pattern and practice of discrimination."[47] In *Evans v. United Air Lines, Inc.*,[48]

43. It has been held that filing a discrimination complaint with the Office of Federal Contract Compliance (OFCC) under the provisions of 41 C.F.R. §§ 60-1.20 to -1.32 (1975), tolls the statute of limitations under Title VII. EEOC v. Nicholson File Co., 408 F. Supp. 229, 233-35 (D. Conn. 1976). Such a filing, however, will not constitute filing with the EEOC. Reynolds Metals Co. v. Rumsfeld, 12 CCH EMPL. PRAC. DEC. ¶ 11,122, at 5191 (E.D Va. 1976). This is true despite an agreement between the OFCC and the EEOC that filing with the OFCC *would* constitute filing with the EEOC. *Memorandum of Understanding Between EEOC and OFCC*, Sept. 11, 1974, para. 10, 1 CCH EMPL. PRAC. GUIDE ¶ 3780 (1976).

44. *Compare* Kennar v. North Am. Rockwell Corp., 9 CCH Empl. Prac. Dec. ¶ 9,992 (C.D. Cal. 1974) (layoff not a continuing act); Gordon v. Baker Protective Servs. Inc., 358 F. Supp. 867, 869 (N.D. Ill. 1973) (demotion not a continuing act), *and* McCarty v. Boeing Co., 321 F. Supp. 260, 261 (W.D. Wash. 1970) (payment of discriminatory pension benefits not a continuing act), *with* EEOC v. Hickey-Mitchell Co., 372 F. Supp. 1117, 1120 (E.D. Mo. 1973) (payment of low wages a continuing act), *and* Mixson v. Southern Bell Tel. & Tel. Co., 334 F. Supp. 525, 527 (N.D. Ga. 1971) (denial of pension benefits a continuing act).

45. *See* Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891, 896-97 (D. Me. 1970). A charge based on failure to recall, however, would only be timely if some employee *other than the charging party* was recalled during the 180-day period. Alleman v. T.R.W., Inc., 13 CCH EMPL. PRAC. DEC. ¶ 11,290 (M.D Pa. Sept. 9, 1976).

46. *See* Smith v. Office of Economic Opportunity, 12 CCH EMPL. PRAC. DEC. ¶ 11,082 (8th Cir. July 21, 1976); Molybdenum Corp. of America v. EEOC, 457 F.2d 935 (10th Cir. 1972).

47. *E.g.*, Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 518 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974); Watson v. Limback Co., 333 F. Supp. 754, 765 (S.D. Ohio 1971). *Contra*, Kramer v. Board of Educ., 12 CCH EMPL. PRAC. DEC. ¶ 11,136 (S.D.N.Y. July 28, 1976). As the concept of the continuing act is expanded to accomodate charging parties whose complaints might otherwise be untimely, it is seldom remembered that one of the compromises which resulted in passage of the 1964 Civil Rights Act was the inclusion of an extremely short statute of limitations period on the filing of charges. *See* Moore v. Sunbeam Corp., 459 F.2d 811, 820-21 (7th Cir. 1972).

48. 534 F.2d 1247 (7th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3329 (U.S. Nov. 2, 1976) (No. 76-333).

the United States Court of Appeals for the Seventh Circuit recently took this concept one step further. The court there held that a stewardess's charge of sex discrimination filed four years after the employer unlawfully terminated her employment and one year after she was reinstated as a new hire alleged a "continuing" violation because she would have had greater seniority had she not been dismissed. In holding that a charge may be timely filed with the EEOC as long as the *effects* of the discriminatory act are still being felt, the court virtually deleted the statute of limitations from Title VII and confused remedial with jurisdictional standards. The court relied upon but misconstrued the decision of the Supreme Court in *Franks v. Bowman Transportation Company*.[49] The ruling in *Bowman* that retroactive seniority is an appropriate Title VII remedy, even where the existing seniority system is facially neutral, does not support the award of back seniority where the charge of discrimination is untimely filed. The plaintiffs in *Bowman* did not attack the seniority system itself but directed their complaint at the employer's failure to hire minorities, and that fact was significant. As the Court noted:

> The underlying legal wrong affecting [plaintiffs] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire.[50]

In *Evans*, the plaintiff did not (and could not because of the statute of limitations) attack her dismissal or reinstatement. Thus, because her complaint was limited to the seniority system itself, *Bowman*, involving an attack on discriminatory hiring, was inapplicable.

It is noteworthy that the United States Court of Appeals for the Ninth Circuit, faced with a case comparable to *Evans* and involving the same employer, reached an opposite result. In *Collins v. United Air Lines, Inc.*,[51] a stewardess, who had been terminated pursuant to the employer's former discriminatory policy and had not been reinstated when the policy was changed, filed a charge alleging continuing nonemployment. In holding the charge untimely, the court said: "[I]t is the

49. 96 S. Ct. 1251 (1976). The Seventh Circuit reversed an earlier decision in *Evans* because of the Supreme Court's intervening decision in *Bowman*. 11 CCH Empl. Prac. Dec. ¶ 10,665 (7th Cir. Jan. 29, 1976).

50. 96 S. Ct. at 1261.

51. 9 CCH Empl. Prac. Dec ¶ 10,082 (9th Cir. 1975).

alleged unlawful act or practice—not merely its effects—which must have occurred within the 90 days [now 180] preceding the filing of charges before the EEOC."[52]

The statute of limitations under Title VII should begin to run when the aggrieved person obtains knowledge, or should reasonably have obtained knowledge, of the injury.[53] Application of this concept to the *Evans* case would have barred the plaintiff's claim because, under the circumstances of the case, the plaintiff should have known for several years prior to filing her charge that she had been adversely affected by the employer's discriminatory practice.[54] In *Reeb v. Economic Opportunity Atlanta, Inc.*,[55] the Fifth Circuit held that it was error to dismiss a complaint on the ground that the underlying charge had been filed with the EEOC more than ninety days after the plaintiff's discharge,[56] because the plaintiff did not have grounds to believe that she had been discriminated against until shortly before she filed the charge. The court noted that "[t]he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights."[57]

If the employer believes that the charge does not allege a continuing unlawful act and is otherwise untimely, he may test the accuracy of

52. *Id.* at 7417; *accord,* Hayes v. Southern Pac. Co., 12 CCH EMPL. PRAC. DEC. ¶ 11,196, at 5504 (C.D. Cal. Aug. 18, 1976).

53. *See* Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (fraud); Ciccarone v. United States, 486 F.2d 253, 256 (3rd Cir. 1973) (medical malpractice); Jones v. Rogers Memorial Hosp., 442 F.2d 773, 774-75 (D.C. Cir. 1971) (medical malpractice); 37 AM. JUR. 2d *Fraud & Deceit* § 405 (1968); Annot., 80 A.L.R.2d 368, 387-96 (1961) (medical malpractice).

54. Plaintiff had been discharged in February 1968. In November 1968, the employer and the union agreed to reinstate all stewardesses who had been terminated pursuant to the unlawful policy and who had filed either grievances under the labor contract or charges with some antidiscrimination agency. 534 F.2d at 1248 n.2. The plaintiff had done neither and was therefore not reinstated. She should have known at that time that she had been injured. She was then hired as a new employee in February 1972, and began to accrue seniority anew. *Id.* at 1248. She could reasonably have been expected at that time to know that she had been disadvantaged. Nevertheless, she did not file her charge until February 1973—5 years after her termination, 4½ years after the agreement eliminating the unlawful policy and reinstating many of the stewardesses, and 1 year after her rehire without retroactive seniority. *Id.*; *see* Cates v. Trans World Airlines, Inc. 12 CCH EMPL. PRAC. DEC. ¶ 11,137, at 5241 (S.D.N.Y. July 22, 1976).

55. 516 F.2d 924 (5th Cir. 1975).

56. The limitations period on filing a charge with the EEOC was 90 days until the 1972 amendment extended it to 180 days. Civil Rights Act of 1964, Tit. VII, Pub. L. No. 88-352, § 706, 78 Stat. 259, *as amended,* 42 U.S.C. § 2000e-5(e) (Supp. V, 1975).

57. 516 F 2d at 930. *See also* Antonopulos v. Aerojet-General Corp., 295 F. Supp. 1390, 1394 (E.D. Cal. 1968).

his belief by refusing to cooperate with the EEOC during its investigation. The commission will then issue and seek judicial enforcement of an investigative subpoena, at which time the employer may challenge the commission's jurisdiction. There are two pitfalls in this approach: (1) the court may find that a determination of whether the alleged unlawful act is continuing cannot be made until *after* the commission's investigation of the charge;[58] or (2) the court may simply allow the charging party to amend his charge so that a continuing act is alleged.[59] Accordingly, an employer should avoid a premature judicial challenge unless it is patently clear that only a single isolated discriminatory act is or can be charged. Another opportunity to challenge the timeliness of the original charge by asserting the absence of a continuing act will come if and when a lawsuit is filed by the EEOC or by the charging party.[60]

Prior to the 1972 amendments, Title VII required the EEOC to furnish the employer with a copy of the charge.[61] Now, however, the statute merely requires service of notice of the charge, stating the date, place, and circumstances of the alleged violation.[62] Such service is to be accomplished within ten days after the charge is filed.[63] Regardless of this requirement, the EEOC's failure to send timely notice of the charge has been held no bar to a subsequent suit filed by the charging party, since it is the policy of the courts not to penalize the individual for the agency's neglect.[64] On the other hand, a suit filed by the EEOC itself

58. *See, e.g.*, Pacific Maritime Ass'n v. Quinn, 491 F.2d 1294, 1296 (9th Cir. 1974).

59. *See* 29 C.F.R. § 1601.11(b) (1975). But see cases cited note 26 *supra*.

60. *See* Loo v. Gerarge, 374 F. Supp. 1338, 1340 (D. Hawaii 1974).

61. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 259, *as amended*, 42 U.S.C. § 2000e-5(b) (Supp. V, 1975). Several state antidiscrimination statutes still require that the employer receive a copy of the charge. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1481(B) (1974); DEL. CODE ANN. tit. 7, § 712(b) (1974); ILL. ANN. STAT., ch. 48, § 858 (Supp. 1976); MINN. STAT. ANN. § 363.06(1) (1966); N.Y. EXEC. LAW § 297(2) (McKinney 1972).

62. 42 U.S.C. § 2000e-5(b) (Supp. V, 1975). If the notice is incomplete, but the employer thereafter becomes aware of the missing elements and suffers no prejudice, the flaw will not require dismissal of the lawsuit. *See* EEOC v. Western Elec. Co., 382 F. Supp. 787, 790-91 (D. Md. 1974); Latino v. Rainbo Bakers, Inc., 358 F. Supp. 870, 872 (D. Colo. 1973).

63. 42 U.S.C. § 2000e-5(b) (Supp. V, 1975). Prior to 1972, there was no time limit on service of the charge, and service within any "reasonable" time was approved by the courts. *See* Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972); Washington v. T.G. & Y. Stores Co., 324 F. Supp. 849, 854-55 (W.D. La. 1971).

64. Burwell v. Eastern Airlines, Inc., 394 F. Supp. 1361, 1367 (E.D. Va. 1975); Healen v. Eastern Airlines, Inc., 9 CCH Empl. Prac. Dec. ¶ 10,023, at 7237 (N.D. Ga. 1973); Foyer v. United A.G. Stores Coop., Inc, 336 F. Supp. 82, 83 (D. Neb. 1972).

may be dismissed if the commission fails to provide the respondent with notice of the charge within ten days.[65]

The EEOC has modified some of these statutory requirements by regulation. For example, the commission recently adopted a regulation pursuant to which it will serve a *copy* of the charge on the respondent within the notice period except when such service "would impede the law enforcement functions of the Commission."[66] A second modification involves identifying the charging party. As noted above, the statute does not require that notice of the charge disclose the name of the complainant, and there was a time when the commission's policy was to withhold the identity of the person filing the charge.[67] That policy, however, is no longer in effect. The *EEOC Compliance Manual*, which sets forth the procedures and guidelines to be followed by commission staff members, now states that "[t]he notice must contain [the] name of [the] person filing the charge . . . ."[68]

As a practical matter, in most jurisdictions it may be several months before the EEOC even *begins* its investigation of the charge.[69] Generally, however, EEOC delays in processing cases due to its administrative overload have not been accepted as grounds for dismissal of the subsequent legal action.[70] An exception might occur where the employer can demonstrate that the delay was prejudicial, as, for example, when it results in his inability to locate necessary witnesses or evidence.[71] Attacks on the sufficiency of the charge, its clarity, the

65. *See* EEOC v. Air Guide Corp., 539 F.2d 1038 (5th Cir. 1976) (court indicated suit would be dismissed if employer suffered prejudice from delay).

66. 41 Fed. Reg. 34745 (1976). If the commission decides to serve only the statutory notice, a copy of the charge will be served when the investigation begins. CCH EEOC COMPLIANCE MANUAL § 10.8 (1976).

67. *See* EEOC v. Western Elec. Co., 382 F. Supp. 787, 790 (D. Md. 1974); 29 C.F.R. § 1601.13 (1975); CCH EEOC COMPLIANCE MANUAL § 10.7 (1976).

68. CCH EEOC COMPLIANCE MANUAL § 10.3 (1976).

69. The EEOC has conceded that it often takes more than two years to process a charge. 9 EEOC ANN. REP. 8 (1974).

70. *See, e.g.*, Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972).

71. *See* EEOC v. North Hills Passavant Hosp., 12 CCH EMPL. PRAC. DEC. ¶ 11,229, at 5702 (3d Cir. Nov. 4, 1976) (suit filed three years after charge not barred by laches where prejudice to employer not shown); EEOC v. Moore Group, Inc., 11 CCH Empl Prac. Dec. ¶ 10,886 (N.D. Ga. 1976) (suit filed 5 years after charge is barred by laches); EEOC v. C & D Sportswear Corp., 398 F. Supp. 300, 303 (M.D. Ga. 1975) (suit filed 5½ years after charge is barred by laches); EEOC v. Hearst Corp., 10 CCH Empl. Prac. Dec. ¶ 10,246 (W.D. Wash. 1974) (defense of laches not maintained in absence of unreasonable delay and prejudice); EEOC v. Joint Apprenticeship Comm., 7 CCH Empl. Prac. Dec. ¶ 9,334 (N.D. Cal. 1974) (6 year delay between charge and suit does not warrant dismissal). *See also* EEOC v. American Mach. & Foundry, Inc., 12

complainant's standing, or failure to comply with technical regulations are unlikely to meet with much success. The courts tend to construe such requirements liberally in favor of the complainant.[72] A lawsuit instituted by the EEOC, on the other hand, may well be subject to dismissal if the agency has violated its own regulations and the employer has suffered prejudice thereby.[73]

The Investigation

Once the charge has been filed and the EEOC supervisor's preinvestigation analysis has been completed, the case will be assigned to an investigator.[74] This individual is generally not an attorney, and he may, in fact, be unfamiliar with the complexities of Title VII. He is also unlikely to have substantial business training or economic knowledge. Nevertheless, he has primary responsibility for conducting the investigation, evaluating the documentary and testimonial evidence, and recommending the determination that will eventually appear over the district director's signature. The employer's ability to deal with the investigator will be enhanced by an understanding of the extent and limitations of the investigative function.

The respondent-employer is likely to be confronted with a number of requests for information and documents at the beginning of the investigation. The EEOC representative may, for example, ask to interview employees, to review personnel files and job applications, and to obtain lists of employees hired, fired, promoted, transferred, laid off, or recalled. He may ask the employer to compile data from his records or to

CCH EMPL. PRAC. DEC. ¶ 11,200, at 5524-25 (M.D Pa. Aug. 26, 1976) (claims for back pay barred by laches in view of 5 year delay in filing suit); Stallworth v. Monsanto Co., 9 CCH Empl. Prac. Dec. ¶ 10,045 (N.D. Fla. 1975) (laches results in reduction of back pay award).

72. *See, e.g.*, Ferguson v The Kroger Co., 12 CCH EMPL. PRAC. DEC. ¶ 11,233 (6th Cir. Oct. 26, 1976); EEOC v. Wah Chang Albany Corp., 499 F.2d 187, 189-90 (9th Cir. 1974); Sanchez v. Standard Brands, Inc., 431 F.2d 455, 462-64 (5th Cir. 1970). *See also* Ramos v. Port Authority, 12 CCH EMPL. PRAC. DEC. ¶ 11,035, at 4818-19 (S.D.N.Y. June 23, 1976) (reliance on erroneous information from EEOC prevents bar to complainant's suit). *But cf.* McCrary v. Metropolitan Life Ins. Co., 12 CCH EMPL. PRAC. DEC. ¶ 11,198 (D. Mass. Feb. 18, 1976) (plaintiff's suit dismissed as untimely even though delay caused by EEOC's efforts to obtain an attorney for her); Lynn v. Western Gillette, Inc., 11 CCH Empl. Prac. Dec ¶ 10,882 (D. Ariz. 1975) (EEOC misinformation no longer causative once plaintiff obtains attorney).

73. See cases cited notes 65 & 71 *supra*. *See also* EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 948 (8th Cir. 1974); EEOC v. Western Elec. Co., 382 F. Supp. 787, 796-97 (D. Md. 1974); EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273, 278 (D. Md. 1973).

74. CCH EEOC COMPLIANCE MANUAL §§ 8, 20.1-.2 (1976).

produce statistical information about his current staff.[75] He may serve administrative interrogatories[76] and subpoenas for the production of documents or witnesses. He may seek to probe into matters which occurred years before the charge was filed[77] and into areas beyond the scope of the allegations contained in the charge.[78] Significantly, the fruits of the investigator's research may later serve as the basis for a lawsuit by the EEOC, by the charging party,[79] or by some third party whose claim develops from facts disclosed during the investigation.[80]

The employer appears to be on the horns of a dilemma. If he vigorously resists the investigator's efforts, he may well be rewarded with an adverse ruling.[81] On the other hand, if he is overly and unnecessarily cooperative, he may sow the seeds for a damaging lawsuit against his company. The danger of being too submissive is highlighted by two federal appeals cases. In the first of these cases, *Sanchez v. Standard Brands, Inc.*,[82] the employer sought to limit the scope of the plaintiff's lawsuit to the claims made in the original charge filed with the EEOC.

75. The EEOC has the statutory authority to establish recordkeeping requirements applicable to all employers covered by Title VII. 42 U.S.C. § 2000e-8(c) (Supp. V, 1975). It has exercised that power; its regulations require employers to maintain all personnel records for a period of six months and to maintain all records relevant to a charge until the disposition of the case. 29 C.F.R. § 1602.14 (1975). What is relevant to the charge is very broadly construed by the regulation: "The term 'personnel records relevant to the charge,' for example, would include personnel or employment records relating to the aggrieved person *and to all other employees holding positions similar to that held or sought by the aggrieved person* and application forms or test papers completed by an unsuccessful applicant *and by all other candidates for the same position* as that for which the aggrieved person applied and was rejected." *Id.* (emphasis added).

76. One court has held that the commission has no authority to issue compulsory interrogatories, pointing out that the statute, the regulations, and the *EEOC Compliance Manual* do not provide for such a discovery method. EEOC v. Western Elec. Co., 382 F. Supp. 787, 793-95 (D. Md. 1974).

77. *See* Linderme Tube Co. v. EEOC, 4 CCH Empl. Prac. Dec. ¶ 7522 (N.D. Ohio 1971) (demand for five years of employee records was "reasonable").

78. *See* EEOC v. United States Fidelity & Guar. Co., 11 CCH Empl. Prac. Dec. ¶ 10,935 (D. Md. May 4, 1976).

79. *See* H. Kessler & Co. v. EEOC, 472 F.2d 1147 (5th Cir.) (en banc), *cert. denied*, 412 U.S. 939 (1973) (complainant entitled to access to EEOC investigative file on his charge).

80. *See* National Elec. Contractors Ass'n v. Walsh, 12 CCH EMPL. PRAC. DEC. ¶ 11,116 (D.D.C. July 29, 1976); Mosley v. General Motors, Corp., 10 CCH Empl. Prac. Dec. ¶ 10,380 (E.D Mo. 1975).

81. The EEOC has adopted the National Labor Relations Board's "adverse inference" rule, under which an employer's unreasonable refusal to present relevant evidence gives rise to an inference that such evidence is adverse to his position. CCH EEOC COMPLIANCE MANUAL § 161 (1976); *see* P.R. Mallory & Co. v. NLRB, 400 F.2d 956, 959 (7th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969).

82. 431 F.2d 455 (5th Cir. 1970).

Rejecting this request, the Fifth Circuit held that the purpose of a charge is "to trigger the investigatory and conciliatory procedures of the EEOC" and that, accordingly, "it is only logical to limit the permissible scope of the civil action to the scope of the EEOC *investigation* which can reasonably be expected to grow out of the charge of discrimination."[83] The Fifth Circuit's holding in *Sanchez* has been adopted by a substantial number of federal district courts, which have ruled that an individual's lawsuit under Title VII may encompass any discriminatory practices which are uncovered by the EEOC during a reasonable investigation of the charge and which are "like or related" to that charge.[84] A suit filed by the EEOC may challenge even those practices not related to the charge if they were discovered during a reasonable investigation of the charge.[85]

The second case illustrating the importance of avoiding blind compliance with EEOC requests for evidence is *EEOC v. Occidental Life Insurance Co.*[86] In that case, the charge alleged sex discrimination based on the employer's refusal to grant maternity leave. During its investigation, the EEOC requested and obtained, apparently without objection, evidence indicating that male employees had been discriminated against in the company's retirement system. When the EEOC

83. *Id.* at 466 (emphasis added); *see* Gamble v. Birmingham S.R.R., 514 F.2d 678, 688-89 (5th Cir. 1975). *Gamble* expanded *Sanchez* by holding that a charging party's lawsuit may properly challenge any discriminatory practices which are "of the same type and character as that originally charged," even if such practices were not themselves the subject of an investigation. *Id.* at 689. One court, going beyond *Sanchez* and *Gamble*, recently held that the private court action may encompass any allegations the plaintiff previously presented to the EEOC, notwithstanding the failure of the commission to investigate such allegations. Vuyanich v. Republic Nat'l Bank, 409 F. Supp. 1083, 1089 (N.D. Tex. 1976) (denying motion to strike claims of sex discrimination where EEOC investigated only racial discrimination). This holding, though unlikely to be followed by other courts, places the employer in a difficult position. In *Gamble*, the employer at least had notice of the kind of discrimination with which he was charged and could preserve the appropriate evidence to defend himself. In *Vuyanich*, he had no reason prior to trial to know that he would have to defend against sex discrimination as well as racial discrimination charges. *Cf.* EEOC v. General Elec. Co., 532 F.2d 359, 368 (4th Cir. 1976).

84. *See, e.g.*, Jiron v. Sperry Rand Corp., 9 CCH Empl. Prac. Dec. ¶ 9990 (D. Utah 1975); Ortega v. Construction Laborers Local 390, 396 F. Supp. 976, 980-81 (D. Conn. 1975); Scott v. University of Del., 385 F. Supp. 937, 942-43 (D. Del. 1974).

85. EEOC v. American Mach. & Foundry, Inc., 12 CCH EMPL. PRAC. DEC. ¶ 11,200, at 5526 (M.D. Pa. Aug. 26, 1976); EEOC v. Greyhound Lines, Inc., 411 F. Supp. 97 (W.D. Pa. 1976); EEOC v. Western Elec. Co., 382 F. Supp. 787, 798 (D. Md. 1974). EEOC investigators are encouraged to be on the lookout for nonalleged violations. CCH EEOC COMPLIANCE MANUAL § 25.3 (1976).

86. 535 F.2d 533 (9th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3101 (U.S. July 23, 1976) (No. 76-99).

thereafter filed suit, including in the complaint allegations about the retirement system, the employer moved to have the allegations stricken as beyond the scope of the original charge. The district court granted the motion, but the Ninth Circuit reversed. Noting that the EEOC has the right to obtain access to all evidence reasonably related to the charge, the court held that, because the employer had allowed the EEOC access to evidence regarding the retirement program, it was precluded from claiming that such evidence was not related to the original charge. The court stated:

> Had [the employer] believed that the EEOC's investigation exceeded the permissible statutory scope, it could have refused the EEOC's demand for access and sought adjudication of its rights. [The employer] did not do so. Thus we can only conclude that the EEOC investigation was reasonable and that the information supporting the allegations in subparagraphs 8(b) and 9(c) [of the complaint] was acquired during that reasonable investigation.[87]

The lesson to be learned from these decisions of the Fifth and Ninth Circuits is that an employer's exposure to liability under Title VII is as broad as the scope of the EEOC's investigation.[88] The employer will be in a position to exert some degree of influence over the scope of the investigative effort if he develops an understanding of the techniques, objectives, and limitations of the investigator and if he is not reluctant to act when the investigator appears to be digressing improperly.

Investigative Tools and Techniques

The investigator is a researcher, and the respondent's personnel files are his primary sources. His access to those files, insofar as the material sought is relevant to the charge,[89] is virtually unlimited. Thus, he is generally entitled to payroll records,[90] disciplinary files,[91] seniority

87. *Id.* at 541 (footnotes omitted); *accord*, EEOC v. General Elec. Co., 532 F.2d 359, 368 (4th Cir 1976). In *General Electric*, the employer's voluntary production of evidence indicating sex discrimination, during an EEOC investigation of racial dscrimination, resulted in judicial approval of a complaint charging both sex and race discrimination.

88. The EEOC may also institute additional proceedings against the employer based on the results of its investigations in other cases. *See* EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1363 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975); EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975).

89. 42 U.S.C. § 2000e-8(a) (1970).

90. EEOC v. Ducommun Metals & Supply Co., 2 CCH Empl. Prac. Dec. ¶ 10,067 (S.D. Tex. 1969); EEOC v. Fram Corp., 2 CCH Empl. Prac. Dec. ¶ 10,034 (N.D. Okla. 1969).

91. Molybdenum Corp. of America v EEOC, 2 CCH Empl. Prac. Dec. ¶ 10,010 (D.N. Mex. 1969).

information,[92] and job applications.[93] The investigator can obtain a list of employees indicating, as relevant, their race, color, religion, sex, and national origin.[94] He may lawfully demand access to the personnel files of past and present employees in order to compare their records with those of the charging party.[95] He may insist on a tour of the employer's facilities[96] and may interview employees either informally or under oath.[97] The investigator's requests must, however, be specific and reasonably calculated to lead to the production of anticipated data; he cannot engage in a blind "fishing expedition,"[98] and requests which are overly broad will not be enforced.[99]

Theoretically, the EEOC investigation is not an adversary proceeding. The investigator's task is merely to examine the facts to determine whether there is any substance to the claims of the charging party. Realistically, however, his *raison d'etre* is to eliminate discrimination, and the more zealous he is in pursuit of this goal, the more antagonistic the relationship between the investigator and the employer may become. When an investigator exceeds the bounds of proper conduct in his

92. Motorola, Inc. v. McLain, 484 F.2d 1339, 1346 (7th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

93. EEOC v. Gibson Prods. Co., 1 CCH Empl. Prac. Dec. ¶ 9915 (M.D. Ga. 1968).

94. *Id. See also* H. Kessler & Co. v. EEOC, 53 F.R D. 330, 336-37 (N.D. Ga. 1971), *aff'd*, 468 F.2d 25 (5th Cir. 1972), *rev'd on other grounds en banc*, 472 F.2d 1147 (5th Cir.), *cert. denied*, 412 U.S. 939 (1973).

95. EEOC v. University of N.M., 504 F.2d 1296, 1306 (10th Cir. 1974).

96. Motorola, Inc. v. McLain, 484 F.2d 1339, 1346 (7th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). The employer should restrict the tour to those areas of the plant relevant to the charge at issue because the EEOC investigator will be watchful for other unalleged violations during his tour. Should he observe areas in which the employees are predominantely Caucasian or where substantial numbers of minority employees are in lower-classified jobs, further charges may be filed.

97. *See* Merkle Press, Inc. v. EEOC, 4 CCH Empl. Prac. Dec. ¶ 7816 (D.D.C. 1972).

98. EEOC v. University of N.M., 504 F.2d 1296, 1301-02 (10th Cir. 1974); Parliament House Motor Hotel v. EEOC, 444 F.2d 1335, 1339 (5th Cir. 1971).

99. *E.g.*, Joslin Dry Goods Co. v. EEOC, 483 F.2d 178, 184 (10th Cir. 1973); H. Kessler & Co. v. EEOC, 53 F.R.D. 330, 336 (N.D. Ga. 1971), *aff'd*, 468 F.2d 25 (5th Cir. 1972), *rev'd on other grounds en banc*, 472 F.2d 1147 (5th Cir.), *cert. denied*, 412 U.S. 939 (1973). "It is endemic to investigators to use the foot-in-the-door approach to try to expand their jurisdiction and to claim the right to investigate anything they think interesting which may remotely concern any matter about which they are inquiring." Joslin Dry Goods Co. v. EEOC, 336 F. Supp. 941, 947 (D. Colo. 1971), *modified on other grounds, supra*. The EEOC's position is that the allegations of the charge "do not define the parameters of an investigation and analysis. . . . A thorough analysis must deal with nonalleged issues related to the issues alleged by the charging party." CCH EEOC COMPLIANCE MANUAL § 26.2(b) (1976).

efforts to establish a case, the employer can obtain judicial protection. If the investigator harasses employees, interferes with the operation of the employer's business, damages the employer's reputation or standing, or otherwise utilizes improper investigative measures, the employer may be able to obtain a court order terminating such measures and restricting the use of evidence resulting therefrom. For example, one court excluded all evidence obtained by means of an EEOC-sponsored newspaper advertisement which indicated that the respondent-employer had been charged with racial discrimination and solicited the assistance of applicants who had unsuccessfully sought jobs with the respondent.[100] Another court refused to allow the commission to use compulsory interrogatories, ruling that the agency had no authority to issue them.[101] A third court refused to enforce a subpoena duces tecum that the commission had addressed to respondent's attorney rather than to the corporate officer in possession and control of the records sought by the agency.[102]

Four topics relating to the EEOC's investigative tools and techniques deserve special attention: the agency's use of subpoenas, the investigator's right to interview employees, the extent of the employer's obligation to compile data at the commission's request, and the use of statistics.

Use of Subpoenas

Prior to the 1972 amendments to Title VII, section 710 of the act provided that the EEOC had the authority to "demand" both access to evidence and the appearance of witnesses;[103] such demands could be enforced or challenged in court.[104] Section 710, as amended,[105] now provides that section 11 of the National Labor Relations Act,[106] which specifies the investigative powers of the National Labor Relations Board, shall be applicable to EEOC investigations. Pursuant to this provision, the EEOC has the power to issue subpoenas, rather than "demands," for

100. EEOC v. Red Arrow Corp., 392 F. Supp. 64 (E.D. Mo. 1974).

101. EEOC v. Western Elec. Co., 382 F. Supp. 787, 793-95 (D. Md. 1974).

102. EEOC v. South Carolina Nat'l Bank, 11 CCH Empl. Prac. Dec. ¶ 10,932 (D.S.C. Mar. 25, 1976).

103. Civil Rights Act of 1964, Pub. L. No. 88-352, § 710, 78 Stat. 264.

104. *See, e.g.*, EEOC v. Ducommun Metals & Supply Co., 2 CCH Empl. Prac. Dec. ¶ 10,067 (S.D. Tex. 1969); Molybdenum Corp. of America v. EEOC, 2 CCH Empl. Prac. Dec. ¶ 10,010 (D.N.M. 1969).

105. 42 U.S.C. § 2000e-9 (1970).

106. 29 U.S.C. § 161 (Supp. V, 1975).

the production of witnesses and evidence.[107] The service of such subpoenas is not limited to persons who are parties to the charge under investigation but may extend to any person in possession of evidence relevant to the charge.[108]

One distinction between the subpoena power of the EEOC and that of the NLRB is that the EEOC's regulations prohibit the issuance of subpoenas at the request of either the charging party or the respondent, while the NLRB is subject to no such restriction.[109] From the employer's viewpoint, this difference is a serious and unfortunate one, since he may need to compel a third party to produce exculpatory evidence. The commission's regulation barring the issuance of such a subpoena unreasonably deprives the employer of an important protection and appears to be contrary to the express stipulation of the act providing for the application of the NLRA investigative procedures.

There are several possible grounds upon which an EEOC subpoena could be challenged. Subpoenas issued long after the filing of a charge may be invalidated if the delay prejudices the employer.[110] A challenge might also be maintained in cases where the subpoena is addressed to one not in possession or control of the records sought[111] or where the commission has not properly obtained jurisdiction (*e.g.*, where it has

107. The EEOC's stated policy is to resort to the use of subpoenas "only after normal investigative methods have been exhausted." CCH EEOC COMPLIANCE MANUAL § 24.1(a) (1976).

108. EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1096 (6th Cir. 1974); EEOC v. National Elec. Benefit Fund, 11 CCH Empl. Prac. Dec. ¶ 10,801 (D.D.C. Apr. 1, 1976); *cf.* Link v. NLRB, 330 F.2d 437, 439-40 (4th Cir. 1964); NLRB v. Lewis, 310 F.2d 364, 366 (7th Cir. 1962).

109. *Compare* 29 C.F.R. § 1601.15(a) (1975), *with* 29 C.F.R. § 102.31 (1976) (issuance of subpoenas by NLRB). In one case involving the NLRB, the Fifth Circuit stated: "Certainly respondent had the same right as the Board to have the examiner issue subpoenas on its behalf and if his failure to do so had resulted in depriving respondent of substantial evidence, we should order the case sent back for the taking of that testimony." NLRB v. Ed. Friedrich, Inc., 116 F.2d 888, 889 (5th Cir. 1940). *See also* Fair Housing Act § 811(b), 42 U.S.C. § 3611(b) (1970). Under this provision, respondents being investigated for alleged discrimination in housing are entitled to the issuance of subpoenas on their behalf "to the same extent and subject to the same limitations" as the investigating agency.

110. *See* EEOC v. Exchange Sec. Bank, 529 F.2d 1214, 1216 (5th Cir. 1976) (subpoena issued twenty-one months after charge must be enforced where respondent failed to show prejudice); EEOC v. South Carolina Nat'l Bank, 11 CCH Empl. Prac. Dec. ¶ 10,932, at 7934 (D.S.C. Mar. 25, 1976) (four year delay); EEOC v. United States Fidelity & Guar. Co., 11 CCH Empl. Prac. Dec. ¶ 10,935, at 7951-52 (D. Md. May 4, 1976) (subpoena issued twenty-seven months after charge must be enforced where respondent failed to show prejudice).

111. EEOC v. South Carolina Nat'l Bank, 11 CCH Empl. Prac. Dec. ¶ 10,932 (D.S.C. Mar. 25, 1976).

neglected to defer to the state or local agency).[112] On the other hand, an EEOC subpoena cannot be successfully attacked on the grounds that the underlying charge is frivolous or false,[113] that the commission failed to serve notice of the charge within the time specified by statute, absent a showing of prejudice,[114] or that the charge is untimely, if the charging party alleges a continuing act and an EEOC investigation is necessary to determine if in fact the discriminatory practice is continuing.[115] Even if the complainant seeks to withdraw his charge, the EEOC may proceed with its investigation of the case and obtain enforcement of its subpoena, since withdrawal can only be effected with the commission's consent,[116] and the paternalistic nature of the statute seems to require protection of a complainant whose decision to withdraw may not be entirely voluntary.[117]

Prior to enactment of the 1972 amendments, a respondent-employer could initiate a judicial review of an EEOC demand for evidence by petitioning the court to modify or vacate the demand.[118] His failure to do so was considered a bar to contesting enforcement.[119] The present statute provides no such judicial procedure. The respondent who wish-

112. *See* Nueces County Hosp. Dist. v. EEOC, 518 F.2d 895 (5th Cir. 1975); EEOC v. Union Bank, 408 F.2d 867 (9th Cir. 1968); *cf.* EEOC v. United States Fidelity & Guar. Co., 10 CCH Empl. Prac. Dec. ¶ 10,549 (D. Md. 1975), *aff'd*, 12 CCH EMPL. PRAC. DEC. ¶ 11,017 (4th Cir. June 29, 1976) (deferral unnecessary where it was clear state would not accept charge).

113. *See* EEOC v. Quick Stop Mkts. Inc., 526 F.2d 802 (8th Cir. 1975); Graniteville Co. v. EEOC, 438 F.2d 32, 36 (4th Cir. 1971); Hardwick Stove Co. v. EEOC, 5 CCH Empl. Prac. Dec. ¶ 8514 (E.D. Tenn. 1972), *aff'd*, 5 CCH Empl. Prac. Dec. ¶ 8515 (6th Cir. 1973).

114. Chromcraft v. EEOC, 465 F.2d 745, 747-48 (5th Cir. 1972).

115. EEOC v. Western Pub. Co., 502 F.2d 599, 603 (8th Cir. 1974); Pacific Maritime Ass'n v. Quinn, 491 F.2d 1294, 1297 (9th Cir. 1974).

116. 29 C.F.R. § 1601.9 (1975).

117. EEOC v. United States Fidelity & Guar. Co., 11 CCH Empl. Prac. Dec. ¶ 10,935, at 7956 (D. Md. May 4, 1976); Allstate Ins. Co. v. EEOC, 4 CCH Empl. Prac. Dec. ¶ 7692 (S.D.N.Y. 1972). Indeed, because the EEOC defends the public interest as well as the interest of the charging party, even the death of the complainant will not bar the EEOC from proceeding. EEOC v. Greyhound Lines, Inc., 411 F. Supp. 97 (W.D. Pa. 1976).

118. Until 1972, 42 U.S.C. § 2000e-9(c) (1970) provided: "(c) Within twenty days after the service upon any person charged under section 2000e-5 of this title of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 2000e-8(a) of this title, such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. . . ."

119. Overnite Transp. Co. v. EEOC, 397 F.2d 368 (5th Cir. 1968).

es to challenge an EEOC subpoena in court apparently must wait for the commission to bring an action for its enforcement.[120] The commission's regulations establish procedures for *administrative* review of the subpoena,[121] but it does not appear that the employer must utilize these procedures in order to preserve his rights.[122]

Employee Interviews

The EEOC investigator will seek to interview the respondent's employees after a charge has been filed, but the employer is under no legal obligation to make his employees available for private interviews during working hours.[123] The extent of the employer's voluntary cooperation in this aspect of the investigation, as a practical matter, will be a function of the testimony he expects the employee to offer. The right of the respondent-employer to have his representative—for example, a supervisor or an attorney—present during such interviews depends upon the status of the employee, the location of the interview, and the willingness of the employee to meet with the investigator privately. The

120. Foreman v. Thalmayer, 10 CCH Empl. Prac. Dec. ¶ 10,282 (N.D. Tex. 1975); Steck-Vaughan Co. v. EEOC, 7 CCH Empl. Prac. Dec. ¶ 9119 (W.D. Tex. 1974). The court would have jurisdiction over the employer's petition for review of an EEOC subpoena if the EEOC counterclaimed for enforcement of the subpoena. *See, e.g.*, New Orleans Pub. Serv., Inc. v. Brown, 507 F.2d 160 (5th Cir. 1975) (by implication); *cf.* Elliott v. American Mfg. Co., 138 F.2d 678 (5th Cir. 1943) (under NLRA). In a judicial proceeding for enforcement of a subpoena, the respondent will not be allowed to take discovery of the EEOC in order to establish that the agency has no need for the evidence subpoenaed. Wurlitzer Co. v. EEOC, 50 F.R.D. 421, 424-25 (N.D. Miss. 1970). *But see* Southern Bell Tel. & Tel. Co. v. EEOC, 1 CCH Empl. Prac. Dec. ¶ 9974 (E.D. La. 1969).

121. 29 C.F.R. § 1601.15(b) (1975). Under this regulation, the director of compliance makes the initial determination of the objections to the subpoena. The EEOC is then supposed to review that determination. The decision becomes final within three days of issuance unless the commission acts to overrule it. The commission's passive acquiescence has been challenged as producing an improper delegation of authority, but that challenge has been rejected. EEOC v. Exchange Sec. Bank, 529 F.2d 1214, 1218-19 (5th Cir. 1976); EEOC v. United States Fidelity & Guar. Co., 11 CCH Empl. Prac. Dec. ¶ 10,935, at 7949-51 (D. Md. May. 4, 1976).

122. In a recent case the Fifth Circuit held that the employer was not required to respond to a subpoena prior to the EEOC's application for judicial enforcement. Once the commission sought enforcement, due process would compel the court to allow his challenge. EEOC v. Exchange Sec. Bank, 529 F.2d 1214, 1217 (5th Cir. 1976). In Overnite Transp. Co. v. EEOC, 397 F.2d 368, 370 (5th Cir. 1968), the court refused to allow objections to an EEOC demand when such objections had not been made in a petition to modify or set aside the demand as provided by the pre-1972 section 710(c). *Cf.* NLRB v. Gemalo, 130 F. Supp. 500 (S.D.N.Y. 1955) (dictum).

123. *But see* Merkle Press, Inc. v. EEOC, 4 CCH Empl. Prac. Dec. ¶ 7816 (D.D.C. 1972).

employer has a clear right, recognized by the EEOC,[124] to be present when the investigator interviews supervisory or managerial employees, because the employer may well be bound on an agency theory by the acts and admissions of such employees.[125] This right is based on the requirements of due process: since the statements of supervisors may often, as a matter of law, be attributed to the employer and result in substantial liability, fairness mandates that the employer be allowed representation when the government seeks to elicit such statements. If the EEOC conducts interviews of supervisors without according the employer proper notice or an opportunity to be present and the employer is prejudiced thereby, it is arguable that the improperly obtained evidence should be excluded.[126]

Employers may instruct their managers and supervisors to refuse to be interviewed by EEOC investigators unless the interview is conducted in the presence of the employer or his attorney. The employer, however, must depend on the employees' loyalty, rather than the threat of reprisal, for implementation of such directions. If an employer disciplines a managerial employee who voluntarily meets with the investigator in private, he violates section 704(a) of the act, which makes it unlawful for an employer to discriminate against an employee because he has "testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter."[127]

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124. "*Attorney's presence*—R may insist on having their attorney present during the interview with R, as well as with any R witness. It is R's right to have counsel present during their own interview. However, distinguish between salaried and hourly paid employees. Those on salary are usually part of management and therefore 'Respondents.' Consequently, R's request for an attorney to be present should be honored even when it requires setting up a new apointment. Hourly paid employees, on the other hand, are not part of management; if R remains adamant in their requests for an attorney, make arrangements to talk with these persons at another time, away from R's premises, if possible." CCH EEOC COMPLIANCE MANUAL § 23.2(c)(3) (1976). *See also* NLRB FIELD MANUAL § 10056.5 (rev. ed. 1971).

125. 42 U.S.C. § 2000e(b) (1970) defines "employer" to include "any agent of such a person." *See* Tidwell v. American Oil Co., 332 F. Supp. 424, 436 (D. Utah 1971); Anderson v. Methodist Evangelical Hosp., 3 CCH Empl. Prac. Dec. ¶ 8282, at 6946 (W.D. Ky. 1971), *aff'd*, 464 F.2d 723 (6th Cir. 1972); *cf.* Furr's, Inc. v. NLRB, 381 F.2d 562, 566 (10th Cir.), *cert. denied*, 389 U.S. 840 (1967).

126. *See* Singer Co. v. NLRB, 429 F.2d 172, 178 (8th Cir. 1970); Montgomery Ward & Co., 187 N.L.R.B. No. 126, 1971 CCH NLRB ¶ 22,660, at 29,309-10 (1971).

127. 42 U.S.C. § 2000e-3(a) (1970). Similarly, section 8(a)(4) of the National Labor Relations Act provides that an employer commits an unfair labor practice if he discharges or otherwise discriminates against an employee who has "given testimony" to the NLRB. 29 U.S.C. § 158(a)(4) (1970). This provision may include supervisory and managerial employees. *See, e.g.*, NLRB v. Schill Steel Prods., Inc., 480 F.2d 586, 594 (5th Cir. 1973); King Radio Corp. v. NLRB, 398 F.2d 14, 22 (10th Cir. 1968).

The acts and statements of nonmanagerial employees cannot, of course, be attributed to the respondent-employer in a discrimination case, and therefore the employer does not have the right to be present during their interviews. The EEOC's stated policy, however, is to grant him that right, if he insists, in interviews conducted at the employer's place of business during working hours.[128] The commission will not notify the employer when it conducts private, off-site interviews of his nonmanagerial employees. In certain cases, as for example where witnesses are reluctant but essential, the commission will resort to the use of a subpoena ad testificandum. In these situations, the EEOC's policy is to notify respondent's attorney of the time and place at which the witness's deposition will be taken and to afford the attorney an opportunity to examine the witness.[129] Failure to give such notice or to allow participation would probably render the resulting deposition inadmissible in a subsequent court proceeding.[130]

The employer's participation in the witness interviewing process need not be limited to attending interviews conducted by the EEOC investigator. The employer has the right to confer independently with whomever he believes has information pertinent to the charge, including the complainant. He must, however, be discreet in his questioning so as to avoid the appearance of harassment or reprisal for the filing of the charge or the the witness's cooperation with the EEOC.[131] Accordingly, the employer would be wise to preface any such questioning with a declaration that the individual's participation in the discussion is totally voluntary, that his job will not be affected by his responses to questions, and that the act prohibits retaliation against those who assist in an EEOC investigation. The questioning should then be conducted in a

Although the NLRB's policy is to allow an employer the opportunity to be present when supervisors are interviewed during an investigation, the board will respect the supervisor's request for privacy. "This policy does not preclude the Board agent from receiving information from a supervisor or agent of the charged party where the individual comes forward voluntarily, or where the individual specifically indicates that he does not wish to have the charged party's counsel or representative present." NLRB FIELD MANUAL § 10056.5 (rev. ed. 1971).

128. *See* CCH EEOC COMPLIANCE MANUAL § 23.3(b) (1976). The manual instructs investigators to "politely resist" the employer's request that he be allowed to be present during interviews. If the employer insists, the investigator is to inform him that the interview report will indicate his presence and be weighed accordingly.

129. CCH EEOC COMPLIANCE MANUAL § 24.3(d)(3) (1976).

130. *See* FED. R. CIV. P. 32(a).

131. See text accompanying note 127 *supra*. *See also* CCH EEOC Dec. ¶ 6123 (1973) (employer's promise of benefits to charging party in return for withdrawal of charge is not unlawful harassment).

noncoercive, nonintimidating manner.[132] These interviews should be conducted immediately upon receipt by the employer of notice of the charge. Testimony should be preserved in written statements, to be available in the event that the memories of witnesses have dimmed by the time the EEOC investigation begins many months later.[133]

Requests for Compilation of Data

The EEOC investigator may ask the respondent to supply him with lists of employees divided into certain relevant categories, to produce an analysis of payroll, hiring, or discipline records, or to compile other data from his files. Compliance with these requests may be burdensome, time-consuming, and expensive. Applying principles derived from the Federal Rules of Civil Procedure, a number of courts have enforced EEOC subpoenas for evidence which could be abstracted or prepared from existing records but have declined to compel employers to "compile information or prepare research or other summaries not normally required under traditional standards of discovery."[134] There has, however, been some disagreement among the courts as to what constitutes a proper request for compilation of data, and judicial responses to employer challenges to such requests have varied based on the particular facts of each case.

While no reliable consensus has emerged, an examination of the cases does reveal that the judiciary has sought to balance the probative value and relevance of the evidence sought against the burden and cost of production to the employer.[135] In *H. Kessler & Co. v. EEOC*,[136] for example, the court enforced the commission's demand for a list of all persons employed by the respondent over the previous two years, indi-

132. *Cf.* United Merchants & Mfrs., Inc., 223 N.L.R.B. No. 102, 1976-77 (CCH NLRB ¶ 17,219; Johnnie's Poultry Co., 146 N L.R.B. 770, 775 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965).

133. *See generally* FED. R. CIV. P. 26, 33, 34, 45.

134. United States Steel Corp. v. EEOC, 6 CCH Empl. Prac. Dec. ¶ 8980, at 6169 (W.D. Pa.), *aff'd*, 6 CCH Empl. Prac. Dec. ¶ 8981 (3d Cir. 1973); H. Kessler & Co. v. EEOC, 53 F.R.D. 330, 336 (N.D. Ga. 1971), *aff'd*, 468 F.2d 25 (5th Cir. 1972), *rev'd on other grounds en banc*, 472 F.2d 1147 (5th Cir.), *cert. denied*, 412 U.S. 939 (1973).

135. *See, e g.*, Rios v. Steamfitters Local 638, 4 CCH Empl. Prac. Dec. ¶ 7792. In *Rios*, the court ordered the parties to calculate the "projected output against the probable cost" of using a computer to analyze union records. When the output appeared highly useful and the indicated cost was reasonable, the court ordered the data compiled. *See also* Struthers Scientific & Int'l Corp. v. General Foods Corp., 45 F.R.D. 375 (S.D. Tex. 1968); Greene v. Raymond, 41 F.R.D. 11, 14 (D. Colo. 1966).

136. 53 F.R.D. 330, 336 (N.D. Ga. 1971), *aff'd*, 468 F.2d 25 (5th Cir. 1972), *rev'd on other grounds en banc*, 472 F.2d 1147 (5th Cir.), *cert. denied*, 412 U.S. 939 (1973).

cating, among other things, their race, sex, date of hire, job classification, promotions, and salary. In *Joslin Dry Goods Co. v. EEOC*,[137] the court refused to enforce an EEOC demand for substantially the same data.[138] The distinction between the two cases probably lies in the fact that the *Kessler* court did "not envision any extreme burden upon [the employer] in the preparation of the list demanded,"[139] while the *Joslin* court found that "the information demanded could not be compiled without the expenditure of a substantial amount of money by [the employer]."[140]

Other courts have taken the position that relevant data must be produced regardless of cost; but when production costs outweigh probative value, costs may be allocated or the subpoena may be modified. In *New Orleans Public Service, Inc. v. Brown*,[141] for example, the Fifth Circuit reversed the district court's order quashing an EEOC subpoena. The court held that relevant documents could not be withheld "merely because full and complete compliance was arguably troublesome and expensive to the employer."[142] The court recognized that the subpoena

137. 336 F. Supp. 941 (D. Colo. 1971), *modified on other grounds*, 483 F.2d 178 (10th Cir. 1973).

138. The court apparently believed that anything other than the mere handing over of existing documents and records constituted "compilation" and could not be compelled. The court noted that "there is no way that the statute can be read to require an employer to *compile* information. Sec. 2000e-8 gives the right to *copy*, and Sec. 2000e-9 requires the *production* of documentary evidence. No statute requires the employer to compile anything, and the courts have so held." 336 F. Supp. at 947 (citations omitted). *Contra*, Sheet Metal Workers Local 104 v. EEOC, 439 F.2d 237, 243 (9th Cir. 1971) (holding that there is nothing "unique about an order to compile lists").

139. 53 F.R.D. at 337.

140. 336 F. Supp. at 945.

141. 507 F.2d 160 (5th Cir. 1975).

142. *Id.* at 164-65; *accord*, Circle K Corp. v. EEOC, 501 F.2d 1052, 1055 (10th Cir. 1974); Burns v. Thiokol Chem. Corp., 483 F.2d 300, 307 (5th Cir. 1973); EEOC v. United States Fidelity & Guar. Co., 11 CCH Empl. Prac. Dec. ¶ 10,935, at 7954 (D. Md. May 4, 1976). *See also* Cameron Iron Works, Inc. v. EEOC, 320 F. Supp. 1191 (S.D. Tex. 1970). In *Cameron*, the court found that "the preparation of the two promotion lists . . . will require expenditure of a significant number of man-hours," but held that "the company cannot prevent disclosure merely by demonstrating the inconvenience of compliance." *Id.* at 1194. *But see* See v. City of Seattle, 387 U.S. 541, 544 (1967) (fourth amendment requires that administrative subpoenas be "sufficiently limited in scope . . . so that compliance will not be unreasonably burdensome"); CCH EEOC COMPLIANCE MANUAL § 26.1(e)(5) (1976) ("burdensomeness is a valid defense" to a request for evidence.) Under 29 U.S.C. § 161 (Supp. V, 1975), which now governs the conduct of EEOC investigations, the NLRB has had little difficulty in obtaining enforcement of its demands for lists of employees with addresses and pertinent employment information. *See, e.g.*, NLRB v. Hanes Hosiery Div., 384 F.2d 188, 191 (4th Cir. 1967), *cert. denied*, 390 U.S. 950 (1968); NLRB v. Costello, 296 F. Supp. 1035 (D. Conn. 1968).

required substantial compilation of data but ruled that this fact alone was not a ground for quashing the entire subpoena.[148] The court ordered the trial judge to apply the standards of Rule 45(b) of the Federal Rules of Civil Procedure to modify the subpoena or to provide for the payment of costs of production to the respondent.[144]

By its terms, Rule 45 sanctions only a subpoena that requires a witness to produce designated and existing documents; it does not authorize a subpoena requiring compilation of data.[145] Nevertheless, a number of courts have interpreted the rule as requiring such compilations when they do not impose a great burden on the employer or when the party serving the subpoena assumes the cost of compilation.[146] Where the difficulty and cost of compiling the data are substantially less for one of the the parties—usually the employer, due to his familiarity

143. 507 F.2d at 164-65. The terms of the subpoena, which were extremely burdensome, are set forth in an appendix to the district court's opinion. 369 F. Supp. 702, 713-14 (E.D. La. 1974).

144. 507 F.2d at 165. FED. R. CIV. P. 45(b) provides: "[t]he court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things." The Fifth Circuit did not seek to apply Rule 45 itself, but only the *standards* developed under the rule. The Rule "does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority." 5A J. MOORE, FEDERAL PRACTICE ¶ 45.01[2] (2d ed. 1975). A subpoena duces tecum cannot be issued under Rule 45 in the absence of pending litigation. *See generally* Sullivan v. Dickson, 283 F.2d 725, 727 (9th Cir. 1960), *cert. denied*, 379 U.S. 984 (1965).

145. 5A J. MOORE, FEDERAL PRACTICE ¶ 45.05[1], at 45-35 (2d ed. 1975). Nor can such compilation be required under FED. R. CIV. P. 34 (production of documents). Berg v. Hoppe, 352 F.2d 776, 779 (9th Cir. 1965); Joslin Dry Goods Co. v. EEOC, 336 F. Supp. 941, 947 (D. Colo. 1971), *modified on other grounds*, 483 F.2d 178 (10th Cir. 1973). *See also* NLRB v. Consolidated Vacuum Corp., 395 F.2d 416 (2d Cir. 1968). In *Consolidated Vaccum* the court required an employer to produce documents and records reflecting wage increases over a two year period but did not require compilation of the data by the employer. Under FED. R. CIV. P. 33(c), a party served with an interrogatory requiring compilations from business records has the option of specifying the records containing the desired data and allowing the adverse party access to those records for the purpose of compiling the information himself.

146. *See, e.g.* Miller v. Sun Chem. Corp., 12 F.R.D. 181, 183 (D.N.J. 1952); State Theatre Co. v. Tri-States Theatre Corp., 11 F.R.D. 381, 384 (D. Neb. 1951); Ulrich v. Ethyl Gasoline Corp., 2 F.R.D. 357, 359-60 (W.D. Ky. 1942). Comparable allocations of burden and cost must be made during litigation. *See* Meadows v. Ford Motor Co., 62 F.R.D. 98, 103 (W.D. Ky. 1973), *modified*, 510 F.2d 939 (6th Cir. 1975) (successful plaintiff recovers cost of copying defendant's employment applications); Blank v. Talley Indus., Inc., 54 F.R.D. 627 (S.D.N.Y. 1972); Adams v. Dan River Mills, Inc., 54 F.R.D. 220, 222 (W.D. Va. 1972) (under Rule 34, defendant in Title VII case required to produce payroll lists; plaintiff required to assume cost).

with the records—that party should bear the initial cost. If the expense and burden are relatively the same for both parties, they should be borne by the party seeking the information.[147] In either event, if the charge becomes a lawsuit, these expenses, together with other discovery expenses, should be considered by the trial court in exercising its discretion to award costs to the prevailing party.[148]

Uses of Statistics

It is now well settled that a Title VII plaintiff can establish a prima facie case of discrimination by offering statistical proof that the employer has a disproportionate number of minority employees in his work force or in the relevant job classification as compared with the general population or the civilian labor force.[149] Likewise, statistics play a significant role during the investigation of a charge under Title VII, because they indicate the broad impact of a particular employment practice on a group of employees more clearly and more reliably than do interviews, employer policy statements, or the complaints of individual employees.[150] The defensive employer must be prepared to clarify or counteract unfavorable statistics, to supplement or modify requests from the EEOC for statistical data, and to prepare and submit unrequested statistics supportive of his position.

One of the basic statistical comparisons likely to be made by the EEOC investigator will be between the minority utilization in the em-

147. *See* 5A J. MOORE, FEDERAL PRACTICE ¶ 45.05[1], at 45-35 to -36 (2d ed. 1975). See the business records option of FED. R. CIV. P. 33(c): the option of producing the records containing the data sought, instead of an abstract, is available only when "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served . . . ." *See* Burns v. Thiokol Chem. Corp., 483 F.2d 300, 307 (5th Cir. 1973); Monsanto Co. v. EEOC, 2 CCH Empl. Prac. Dec. ¶ 10,098 (N.D. Fla. 1969).

148. 42 U.S.C. § 2000e5(k) (1970); *see* Barnett v. W.T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975). See cases cited at note 146 *supra*.

149. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973); Senter v. General Motors Corp., 532 F.2d 511, 527 (6th Cir. 1976); Muller v. United States Steel Corp., 509 F.2d 923, 928 (10th Cir. 1975). *See also* Dorsaneo, *Statistical Evidence in Employment Discrimination Litigation: Selection of the Available Population, Problems, and Proposals*, 29 SW. L.J. 859 (1975); Note, *Employment Discrimination: Statistics and Preferences under Title VII*, 59 VA. L. REV. 463 (1973). Where the prima facie statistical case is unrebutted, judgment will likely be entered for the plaintiff. *See* Stewart v. General Motors Corp., 12 CCH EMPL. PRAC. DEC. ¶ 11,260 (7th Cir. Oct. 4, 1976).

150. The employer's good faith or honest intentions are irrelevant, of course, if his practices have an adverse impact on a protected minority group. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Rowe v. General Motors Corp., 457 F.2d 348, 355-56 (5th Cir. 1972).

ployer's work force and the minority population in the state or county or in the civilian labor force. The civilian data chosen for comparison may well control the outcome of the charge. In one recent case,[151] for example, the employer's plant was located in a city with a Black population of 51 percent. The Black population of the greater metropolitan area, however, was only 22 percent. The court noted that comparing the employer's work force, which was 16 percent Black, to the population of the greater metropolitan area and to the population of the city itself, would produce "widely differing conclusions."[152]

Statistical analyses of the employer's work force have "little probative value without statistical background data concerning the eligible . . . labor pool from which [minority employees] would have been drawn."[153] The "eligible labor pool" should only include those qualified for the jobs in question.[154] Relevant background data is generally available from government agencies such as the Census Bureau, the Bureau of Labor Statistics, or a state's labor or employment department. The employer would be wise not to save for the court his arguments regarding the appropriate civilian population to be compared with his labor force. Rather, he should make these arguments to the EEOC during the investigative stage, in the hopes of obtaining early agreement on this issue.

As a general rule, the employer should not blindly supply statistical data to the EEOC but should explain unfavorable data and supplement misleading information. The EEOC often requests data comparing the number of minority employees hired with the total number of applicants. If such statistics are underrepresentative of the employer's actual minority utilization, he might be justified in protesting that reliance on job applications is misleading because, for example, duplications are numerous, job inquiries often come in and are rejected by phone, and

151. Hester v. Southern Ry., 497 F.2d 1374, 1379 n.6 (5th Cir. 1974); *cf.* League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 896-97 (C.D. Cal. 1976).

152. 497 F.2d at 1379 n.6.

153. Kirkland v. New York State Dep't of Correctional Serv., 520 F.2d 420, 428 (2d Cir. 1975), *cert. denied*, 45 U.S.L.W. 3249 (U.S. Oct. 5, 1976); *accord*, Robinson v. Union Carbide Corp., 12 CCH EMPL. PRAC. DEC. ¶ 11,179, at 5247-28 (5th Cir. Sept. 10, 1976).

154. *See* Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620-21 (1974); James v. Wallace, 12 CCH EMPL. PRAC. DEC. ¶ 11,001, at 4718-18 (5th Cir. June 21, 1976); Kaplan v. International Alliance of Theatrical Employees, 525 F.2d 1354, 1358 (9th Cir. 1975). *But see* Spurlock v. United Airlines, Inc., 475 F.2d 216, 218 (10th Cir. 1972) (statistics limited to "qualified" applicants not acceptable where qualifications themselves alleged to be discriminatory).

many applications are filed by unqualified persons responding to affirmative action recruiting.[155] If the EEOC asks for a breakdown of all minority employees in a particular job category, the employer should consider whether a combination of two or more classifications, departments, or facilities would be more appropriate. Often, jobs with different titles are similar enough in content to be considered equivalent for such statistical purposes. On the other hand, the EEOC may require company-wide data and the employer may prefer to submit more limited statistics restricted, for example, to one department or facility. The most influential factors in deciding the appropriate scope of statistical samples within the company are the similarity of jobs, the mobility and interchangeability of employees, the centralization of labor relations, and the similarity of employment practices in different facilities or departments.[156] If the statistical sample requested by the investigator involves only a small number of employees, the employer may have the right to object to such evidence as irrelevant or not probative. It has been held that "statistical evidence derived from an extremely small universe . . . has little predictive value and must be disregarded."[157]

The employer often must be creative in supplying, clarifying, or supplementing statistics. For example, an employer confronted with the fact that only 5 percent of his work force is Black might be able to argue that the percentage would be a more favorable 20 percent if the EEOC did not include in its sampling employees hired before the Civil Rights Act became effective in July 1965.[158] Additionally, the employer might be able to show that there was a larger percentage of Black

155. Such an argument was successful in Robinson v. Union Carbide Corp., 538 F.2d 652, 657-58 (5th Cir. 1976). The plaintiff had established that Blacks, on the average, filed 50% of the applications and obtained 26% of the jobs. When the court ruled that the application evidence was unreliable, it accepted the employer's argument that nondiscrimination was shown by the fact that, over the past four years, 33% of the new hires had been Black although the plant operated in an area where only 25% of the population was Black.

156. *See* Joslin Dry Goods Co. v. EEOC, 483 F.2d 178, 184 (10th Cir. 1973); Parliament House Motor Hotel v. EEOC, 444 F.2d 1335, 1340 (5th Cir. 1971); Union Bank v. EEOC. 296 F. Supp. 313, 314 (C.D. Cal. 1967), *aff'd*, 408 F.2d 867 (9th Cir. 1968).

157. Harper v. Trans World Airlines, Inc., 525 F.2d 409, 412 (8th Cir. 1975) (five persons); *accord*, Morita v. Southern Cal. Permanente Med. Group, 12 CCH EMPL. PRAC. DEC. ¶ 11,161, at 5350 (9th Cir. Aug. 17, 1976) (eight persons); Robinson v. City of Dallas, 514 F.2d 1271, 1273 (5th Cir. 1975) (seven persons); Keely v. Westinghouse Elec. Corp., 404 F. Supp. 573, 579 (E.D. Mo. 1975) (thirty-four persons). *But see* Chicano Police Officer's Ass'n v. Stover, 526 F.2d 431, 439 (10th Cir. 1975), *vacated and remanded*, 96 S. Ct. 3161 (1976).

158. *See* Patterson v. American Tobacco Co., 535 F.2d 257, 275 (4th Cir. 1976).

applicants hired in the previous year than any other ethnic or racial group,[159] or, on the other hand, that few qualified Blacks applied for the jobs in question or resided in the appropriate recruiting area. The employer's claim that no qualified minority applicants are available, however, will carry little weight if the job qualifications themselves are challenged as discriminatory.[160]

The EEOC is particularly impressed by favorable trends in employment patterns. A steady annual increase in minority utilization is much more persuasive to the commission than a semiannual or annual aberration in employment statistics. Thus, although the employer's utilization of Blacks in a given geographical area ought to be 20 percent, the fact that it is only 15 percent is less likely to be viewed unfavorably if that figure has increased from 10 percent the previous year and 5 percent the year before that. Likewise, an employer faced with the fact that less than a third of his management employees are women may be able to demonstrate that, in the preceding two years, women obtained more than half of the promotions into entry level management positions, which would result in a more balanced distribution in the near future.

The Problem of "Relevance"

Section 709(a) of the act provides that the EEOC investigator

> shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter *and is relevant to the charge under investigation.*[161]

The phrase "relevant to the charge under investigation" has been the subject of substantial litigation and interpretation, particularly since *Sanchez v. Standard Brands, Inc.*[162] and its progeny[163] established the principle that a lawsuit under Title VII could encompass all areas of discrimination uncovered during the EEOC investigation of a charge. On the whole, employer efforts to narrow the construction of section 709(a) have been unsuccessful. While lip service has been paid to the well established doctrine prohibiting administrative "fishing expeditions,"[164] courts have been reluctant to restrict the commission's inquiry

159. *See* Ochoa v. Monsanto Co., 335 F. Supp. 53, 56, 59 (S.D. Tex. 1971), *aff'd*, 473 F.2d 318 (5th Cir. 1973).

160. Spurlock v. United Airlines, Inc., 475 F.2d 216, 218 (10th Cir. 1972).

161. 42 U.S.C. § 2000e-8(a) (1970) (emphasis added).

162. 431 F.2d 455 (5th Cir. 1970).

163. See notes 82-87 & accompanying text *supra.*

164. *E.g.*, EEOC v. University of N.M., 504 F.2d 1296, 1302 (10th Cir. 1974);

and have generally allowed access to any evidence which appears even remotely relevant to the charge. More than one court has held that a single charge of employment discrimination is a sufficient basis for a "full-scale inquiry into the alleged unlawful motivation in employment practices."[165]

As a result, the relationship between the charge itself and the scope of the EEOC's investigation appears to have diminished. To many courts the charge has become merely a "jurisdictional springboard" for the commission.[166] Thus, a complaint to the EEOC alleging a discriminatory *discharge* has been said to justify inquiry into the employer's hiring practices,[167] his customer relations,[168] and his transfer and pro-

Parliament House Motor Hotel v. EEOC, 444 F.2d 1335, 1339 (5th Cir. 1971). *See also* United States v. Morton Salt Co., 338 U.S. 632, 652-53 (1950); FTC v. American Tobacco Co., 264 U.S. 298, 305-06 (1924).

165. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 425 (8th Cir. 1970); *accord*, EEOC v. General Elec. Co., 532 F.2d 359, 364 (4th Cir. 1976); Motorola, Inc. v. McLain, 484 F.2d 1339, 1346 (7th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355, 358 (6th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968). *Contra*, United States Steel Corp. v. EEOC, 6 CCH Empl. Prac. Dec. ¶ 8980, at 6169 (W.D. Pa.), *aff'd*, 6 CCH Empl. Prac. Dec. ¶ 8981 (3d Cir. 1973).

166. EEOC v. General Elec. Co., 532 F.2d 359, 364 (4th Cir. 1976); EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975).

167. Joslin Dry Goods Co. v. EEOC, 483 F.2d 178, 184 (10th Cir. 1973).

168. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). *See also* EEOC Dec. No. 74-84, 2 CCH Empl. Prac. Guide ¶ 6450 (1975). The *Rogers* decision is hardly persuasive authority. The court's opinion was written by one judge, another concurred in the result for different reasons, and a third dissented. The court held that evidence of patient segregation in a medical facility was relevant to a determination of whether employees were discriminated against because such segregation "could be so employee demeaning as to constitute an invidious condition of employment." 454 F.2d at 240. The probative value of such evidence is highly questionable. The EEOC and the courts have on occasion held that an employer violates Title VII by suffering the existence of a work environment in which minorities are subjected to harassment. *See, e.g.*, Gray v. Greyhound Lines, 12 CCH EMPL. PRAC. DEC. ¶ 11,211, at 5582 (D.C. Cir. Oct. 13, 1976); Johnson v. Lillie Rubin Affiliates, Inc., 5 CCH Empl. Prac. Dec. ¶ 8542 (M.D. Tenn. 1972); EEOC Dec. No. 72-1561, CCH EEOC Dec. ¶ 6354 (1973); EEOC Dec. No. 72-0621, CCH EEOC Dec. ¶ 6311 (1971); EEOC Dec. No. 71-2598, CCH EEOC Dec. ¶ 6284 (1971). However, other courts have refused to find violations where the employee's own social sensitivity, rather than the employer's discrimination, was the basis for the injury. *See, e.g.*, Howard v. National Cash Register Co., 9 CCH Empl. Prac. Dec. ¶ 10,177, at 7806 (S.D. Ohio 1975); Fekete v. United States Steel Corp., 5 CCH Empl. Prac. Dec ¶ 8569, at 7679 (W.D. Pa. 1973). Minorities, of course, have not been given statutory immunity from prejudice, either directed at them or committed in their presence. *But see* Waters v. Heublein, Inc., 12 CCH EMPL. PRAC. DEC. ¶ 11,238 (9th Cir. 1976) (Caucasian has standing to challenge employer for maintaining work environment in which racial and ethnic minorities are discriminated against). It is further submitted that Title VII does not eliminate an employer's personal right to be prejudiced or to discriminate in his business or private

motion policies.[169] Similarly, the investigation of a charge against a multi-store or multi-department employer has often been expanded beyond the facility in which the charging party worked to cover all of the employer's stores or departments.[170] The investigative net has frequently been thrown over an entire category of evidence without judicial direction that irrelevant material, which may include personal and confidential data, be deleted. In one case, for example, the court ordered compliance with an EEOC subpoena that required production of the complete personnel files of all employees over a three year period, despite the employer's objection that the files contained much irrelevant personal data.[171] The better approach would have been for the court to review, *in camera*, those portions of the files deemed irrelevant by the employer.

The most recent and perhaps the ultimate expansion of the concept of relevance occurred in *EEOC v. United States Fidelity & Guaranty Co.*[172] In that case, the court held that the scope of the EEOC's investigation may encompass any discrimination which *could* have been alleged by the charging party, regardless of what actually *was* alleged. The court based its ruling on the employee's presumed inability "to make a legal conclusion as to the bases upon which she is being

life as long as he does not act in ways which limit the employment opportunities of persons protected by the act. Similarly, under the NLRA, an employer has the right to be overtly prejudiced against unions as long as he does not discriminate against employees on the basis of their union activities. *See* NLRB v. Ogle Protection Serv., Inc., 375 F.2d 497, 505 (6th Cir. 1967); NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886, 896-97 (5th Cir. 1962).

169. Veazie v. Southern Greyhound Lines, 374 F. Supp. 811, 815 (E.D. La. 1974). For two months in 1972, the Fifth Circuit followed a restrictive rule with respect to the scope of the EEOC investigation. In a case heard during that period, the court held that the EEOC's investigation of a charge alleging a discriminatory refusal to hire was limited to the employer's hiring practices. Tedford v. Airco Reduction, Inc., 4 CCH Empl. Prac. Dec. ¶ 7654 (5th Cir. 1972). Sixty-four days later, the court vacated the opinion as "based upon incomplete argumentation." 4 CCH Empl. Prac. Dec. ¶ 7776.

170. Parliament House Motor Hotel v. EEOC, 444 F.2d 1335, 1340 (5th Cir. 1971); Graniteville Co. v. EEOC, 438 F.2d 32, 42 (4th Cir. 1971); Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355, 358 (6th Cir. 1969). Some courts have reached a contrary result where the employer's facilities were independently managed and the employer's labor relations policies were not centrally controlled. *See, e.g.*, Joslin Dry Goods Co. v. EEOC, 483 F.2d 178, 184 (10th Cir. 1973); United States Steel Corp. v. EEOC, 6 CCH Empl. Prac. Dec ¶ 8980, at 6169 (W.D. Pa.), *aff'd*, 6 CCH Empl. Prac. Dec. ¶ 8981 (3d Cir. 1973); Union Bank v. EEOC, 296 F. Supp. 313, 314 (C.D. Cal. 1967), *aff'd*, 408 F.2d 867 (9th Cir. 1968).

171. EEOC v. University of N.M., 504 F.2d 1296, 1302-04 (10th Cir. 1974); *see* Comment, 1975 UTAH L. REV. 264, 275.

172. 11 CCH Empl. Prac. Dec. ¶ 10,935 (D. Md. May 4, 1976).

discriminated against."[173] Accordingly, the court granted enforcement of commission subpoenas seeking information as to respondent's employees identified by sex even though the two charges being investigated specifically alleged only racial discrimination.[174]

The court's holding in *United States Fidelity* is a significant expansion of the leading case in this area, *Sanchez v. Standard Brands, Inc.*[175] In *Sanchez*, the Fifth Circuit held:

> [T]he crucial element of a charge of discrimination is the *factual* statement contained therein. Everything else entered on the form is, in essence, a mere amplification of the factual allegations. The selection of the type of discrimination alleged, i.e., the selection of which box to check, is in reality nothing more than the attachment of a legal conclusion to the facts alleged. In the context of a statute like Title VII it is inconceivable that a charging party's rights should be cut off merely because he fails to articulate correctly the legal conclusions emanating from his factual allegations.[176]

Accordingly, the *Sanchez* court held that the plaintiff's claim of discrimination based on national origin had been timely as an amendment to her original charge of sex discrimination, because the facts set forth in the first charge were sufficient to warrant an investigation of discrimination based on national origin.

It is reasonable to construe *Sanchez* as establishing the principle that the EEOC has the right to investigate unalleged violations indicated by the facts stated in the charge.[177] Such a concept does not, however, support the holding of the court in *United States Fidelity* that the EEOC may actively seek out evidence of all unalleged violations which the complainant would have standing to raise, *regardless* of the facts alleged

173. *Id.* at 7957. As a practical matter, persons wishing to file discrimination charges are generally assisted by agency personnel when they draft the charge. *See* CCH EEOC COMPLIANCE MANUAL § 2.2 (1976).

174. With respect to two other charges, however, the court refused to compel production of evidence relating to national origin because the complainants did not belong to a distinct ethnic group. The court also refused to enforce a subpoena seeking racial evidence where the complainant was Caucasian "and could not complain of discrimination on the basis of race." 11 CCH Empl. Prac. Dec. ¶ 7960. *Contra,* McDonald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574 (1976).

175. 431 F.2d 455 (5th Cir. 1970).

176. *Id.* at 462.

177. Although *Sanchez* held that a Title VII lawsuit may be as broad as the scope of the EEOC investigation, a small minority of courts have held that a lawsuit cannot be based on a category of discrimination (*e.g.*, race or sex) different from that alleged in the charge filed with the EEOC. *See, e.g.*, Jenkins v. Blue Cross Mut. Hosp., Inc., 522 F.2d 1235, 1240-41 (7th Cir. 1975); Jones v. United Gas Improvement Corp., 68 F.R.D. 1, 8-10 (E.D. Pa. 1975); EEOC v. New York Times Broadcasting Serv., Inc., 364 F. Supp. 651, 653-54 (W.D. Tenn. 1973).

in the charge.[178] In that case, the court approved an EEOC investigation into possible sex discrimination even though the charge specifically alleged only racial discrimination and contained facts negating any reasonable likelihood of sex discrimination.[179] *United States Fidelity* is thus a serious digression from the *Sanchez* line of cases because it contradicts the rule that the factual statement is the crucial element of a charge and that the scope of the EEOC's investigation must be reasonably related to that statement. Furthermore, if the EEOC investigation, which normally does not begin until many months after the charge is filed, is to encompass unalleged charges, the employer may be prejudiced by the lack of timely notice of such charges and may have grounds to resist a subpoena for evidence related to those charges.

Congress clearly intended to maintain some relationship between the breadth of the charge and the scope of the EEOC investigation. This is indicated by the fact that, in providing that the statutory regulations governing NLRB investigations should apply to the EEOC,[180] Congress did not accept the broader concept of relevance embodied in those regulations. Thus, the EEOC is allowed access only to evidence "relevant to the charge under investigation,"[181] while the NLRB has access to any evidence "that relates to any matter under investigation or in question."[182] Strangely enough, the courts have construed the NLRA language in a more restrictive manner than they have the narrower Title

178. In two recent appellate court decisions involving the EEOC's right to maintain a lawsuit based on claims of discrimination not raised in the initial charge but developed during the investigation, the EEOC had not sought evidence of the unalleged violations but had obtained it during the course of a reasonable investigation of the *alleged* violations. *See* EEOC v. Occidental Life Ins. Co., 535 F.2d 533, 540-41 (9th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3101 (U.S. July 23, 1976) (No. 76-99); EEOC v. General Elec. Co., 532 F.2d 359, 365-66 (4th Cir. 1976).

179. The charge filed with the EEOC read as follows: "I have been working for the co. for 3 years, 6 months and 6 days. Since this time I have not received a promotion. I was told when I began to work there that promotions were made on a seniority basis. *Three white girls have been promoted with less seniority than I.* To my knowledge I have never been evaluated by my supervisor, and my work has been as good or better than any of my co-workers. I believe that the failure of my employer to promote me is based on my race (Black). There are only 5 Blacks out of approximately 130 employees." 11 CCH Empl. Prac. Dec. at 7955 (emphasis added). *Contra* EEOC v. Cambridge Tile Mfg. Co., 13 CCH EMPL. PRAC. DEC. ¶ 11,288, at 5955 (S.D. Ohio Dec. 13, 1976).

180. 42 U.S.C. ¶ 2000e-9 (Supp. V, 1975); *see* 29 U.S.C. § 161 (1970).

181. 42 U.S.C. § 2000e-8(a) (1970).

182. 29 U.S.C. § 161(1) (1970). A proposal that the NLRA language be incorporated into Title VII was considered and rejected by Congress. Graniteville Co. v. EEOC, 438 F.2d 32, 39-41 (4th Cir. 1971).

VII provision. For example, in *NLRB v. Fant Milling Co.*,[183] the Supreme Court held that an NLRB investigation could not be confined "to the precise particularizations of a charge"[184] but that the board does not have "carte blanche to expand the charge as they might please, or to ignore it altogether."[185] The investigation could deal only with those unfair labor practices "which are related to those alleged in the charge and which grow out of them . . . ."[186] Subsequent decisions have interpreted *Fant Milling* to require that when the board issues a complaint encompassing allegations not made in the original charge, the new allegations must be "of the same general nature as that asserted in the charge"[187] or "closely related" to the events complained of in the charge and "of the same class" as those events.[188] The EEOC, whose investigatory powers are limited by statute to the scope of the charge, should be given no greater latitude in conducting its investigations.

The Determination

Following its investigation, the EEOC issues a determination whether there is reasonable cause to credit the allegations of the charge. The EEOC is supposed to "make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge . . . ."[189] The commission's backlog, however, has generally prevented compliance with this provision, and the courts have not enforced a literal reading.[190] The issuance of a reasonable cause determination is a condition precedent to a suit filed by the EEOC[191] but not to an action brought by an individual.[192]

183. 360 U.S. 301 (1959).

184. *Id.* at 308-09.

185. *Id.* at 309.

186. *Id. See also* National Licorice Co. v. NLRB, 309 U S. 350, 369 (1940).

187. NLRB v. Braswell Motor Freight Lines, Inc., 486 F.2d 743, 746 (7th Cir. 1973).

188. NLRB v. Operating Engr's Local 925, 460 F.2d 589, 596 (5th Cir. 1972).

189. 42 U.S.C. § 2000e-5(b) (Supp. V, 1975).

190. *See, e.g.*, Steck-Vaughn Co. v. EEOC, 8 CCH Empl. Prac. Dec. ¶ 9796, at 6333 (W.D. Tex. 1974). Even if the commission's untimely issuance of a reasonable cause determination resulted from mere error or neglect rather than administrative overload, an employer could not obtain dismissal of a subsequent lawsuit on such grounds except in the unlikely event that he had been prejudiced by the delay. *See generally* EEOC v. Laclede Gas Co., 530 F.2d 281 (8th Cir. 1976); EEOC v. Hearst Corp., 10 CCH Empl. Prac. Dec. ¶ 10,246 (W.D. Wash 1974) (defense of laches not maintainable in absence of unreasonable delay and prejudice).

191. EEOC v. Westvaco Corp., 273 F. Supp. 985, 991-93 (D. Md. 1974).

192. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973); Jefferson v. Peerless Pumps Hydrodynamics, 456 F.2d 1359, 1361 (9th Cir. 1972).

Reasonable cause findings are typically rendered by the district directors,[193] even though the statute gives the commission that responsibility.[194] This delegation of authority has been held proper.[195] Requests for reconsideration of reasonable cause determinations will not be granted, but the commission or the district directors may, sua sponte, reconsider such findings at any time.[196] The commission's regulations used to provide that it would notify the interested parties prior to reconsidering a reasonable cause determination, and the commission was severely criticized when it failed to issue such notices.[197] In response to the criticism, the EEOC amended its regulations to require notification only after the actual decision on reconsideration had been rendered.[198] Thus, there is still no administrative appeal from a determination of reasonable cause, and the courts have refused to review the factual basis for such a determination.[199]

Section 706(b) of Title VII[200] requires the EEOC, when making its reasonable cause decision, to "accord substantial weight to final findings and orders made by state or local authorities" which have investigated the charging party's claims. The EEOC has diluted the strength of this provision considerably. Its procedural rules define "final findings and orders" to include only those rendered after a public hearing and served by local agencies upon the EEOC.[201] "Substantial weight" is defined to mean "such full and careful consideration . . . as is appropriate in light of the facts supporting [the findings]"[202] In addition, the following prerequisites must be satisfied:

(i) The proceedings were fair and regular; and

(ii) The remedies and relief granted are comparable in scope to the remedies and relief required by Federal law; and

(iii) The final findings and order serve the interest of the effective enforcement of Title VII.[203]

193. *See* 29 C.F.R. § 1601.19b(b), (d) (1975).

194. 42 U.S.C. § 2000e-5(b) (Supp. V, 1975).

195. EEOC v. Raymond Metal Prods. Co., 530 F.2d 590, 594 (4th Cir. 1976); *cf.* EEOC v. Otto, 12 CCH EMPL. PRAC. DEC. ¶ 11,154 (D. Md. Feb 20, 1976).

196. 29 C.F.R. § 1601.19b(b), (d) (1975).

197. Veazie v. Southern Greyhound Lines, 374 F. Supp. 811, 813-14 (E.D. La. 1974).

198. 29 C.F.R. § 1601.19b(b), (d) (1975). The regulation was amended three months after the *Veazie* decision.

199. *See* EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1338 (D. Del. 1974); EEOC v. Eagle Iron Works, 8 CCH Empl. Prac. Dec. ¶ 9541, at 5355 (S.D. Iowa 1974).

200. 42 U.S.C. § 2000e-5(b) (Supp. V, 1975).

201. 29 C.F.R. § 1601.19b(e) (1975).

202. *Id.*

203. *Id.*

Finally, the EEOC rules provide that substantial weight will *not* be given to the state agency's conclusions of law.[204]

Given the manner in which the EEOC construes the statutory requirement that it accord substantial weight to state findings, it is no surprise that the commission often renders reasonable cause determinations which are contrary to those issued by state agencies. In such cases, the federal courts have not required the commission to explain its reasons for reaching contrary results or to specify the manner and extent to which it accorded substantial weight to the state findings.[205] The "substantial weight" provision is thus devoid of value owing to lack of enforcement. In view of the burden on the employer of requiring him to respond to the often duplicative investigations of state and federal commissions, the EEOC should be required to offer some explanation when it arrives at a conclusion opposite to that reached by the state agency on the same set of facts. This would protect the employer against overzealous investigators who disregard state proceedings entirely. Furthermore, the state agency might benefit from the EEOC's expertise if it learned the *ratio decidendi* of the EEOC's contrary conclusion.

The commission encourages its staff members (1) to draft reasonable cause findings which are likely to persuade the employer that a violation of Title VII has occurred, and (2) to resist the impulse "to torture a 'cause' decision" out of facts which may indicate unfair treatment, but not Title VII discrimination.[206] The employer who is deciding whether to attempt conciliation with the commission should review the reasonable cause determination carefully, since the findings and conclusions contained therein will circumscribe the scope of the EEOC's conciliation efforts.[207] If concilation is unsuccessful, the determination will influence the EEOC attorneys in deciding whether or not a lawsuit is warranted. Furthermore, even though the commission does not accept motions for reconsideration of reasonable cause determinations, a request for clarification might be granted if the determination is imprecise. Neither the EEOC nor the employer can make a good faith effort

204. *Id.*

205. *See, e.g.*, United States v. Sweet Home Cent. School Dist., 407 F. Supp. 1362, 1365-66 (W.D.N.Y. 1976).

206. *See* CCH EEOC COMPLIANCE MANUAL §§ 125.2, .3 (1976).

207. EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1336 (D. Del. 1974). The reasonable cause determination will also circumscribe the scope of the eventual lawsuit. EEOC v. General Elec. Co., 532 F.2d 359, 366 (4th Cir. 1976); EEOC v. American Mach. & Foundry, Inc., 12 CCH EMPL. PRAC. DEC. ¶ 11,200 at 5528 (M.D. Pa. Aug. 26, 1976).

at conciliation unless both parties agree on the scope of the discriminatory practice which they are trying to eliminate.

The Conciliation Effort

Good Faith Requirement

Once the commission determines that there is reasonable cause to believe the allegations of the charge are true, it must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[208] The fruit of these endeavors will be a written conciliation agreement enforceable in federal court as a contract.[209] For the process to be completely successful, of course, the conciliation agreement must be executed by all parties concerned. A settlement between the employer and the EEOC does not bar a suit by the charging party,[210] and a settlement between the charging party and the employer does not bar a subsequent suit by the EEOC.[211]

Under the recent decision of the Court of Appeals for the Fifth Circuit in *Cox v. Allied Chemical Corp.*, the charging party will not be bound by a conciliation agreement bearing his signature if he can later establish that he did not fully comprehend the significance of his act when he waived his right to sue.[212] After suit is filed by such an individual, the district court must conduct a hearing to determine whether the waiver was knowing and voluntary. Assuming the *Allied Chemical* holding is followed in other jurisdictions, it becomes incumbent on the employer-respondent to insure that the charging party has been fully apprised of his rights before he signs a settlement under Title VII. The EEOC should, of course, assume this responsibility itself, but the employer cannot rely on the agency since the courts generally refuse to penalize individuals for EEOC errors and omissions.[213] It might be

208. 42 U.S.C. § 2000e-5(b) (Supp. V, 1975). "The commission's statutory duty to attempt conciliation is among its most essential functions." EEOC v. Raymond Metal Prods. Co., 530 F.2d 590, 596 (4th Cir. 1976).

209. *See* EEOC v. Mississippi Baptist Hosp., 11 CCH Empl. Prac. Dec. ¶ 10,822, at 7449 (S.D. Miss. Jan. 29, 1976).

210. Cox v. United States Gypsum Co., 409 F.2d 289, 291 (7th Cir. 1969); *see* 42 U.S.C. § 2000e-5(f)(1) (Supp. V, 1975).

211. EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010 (6th Cir. 1975).

212. Cox v. Allied Chem. Corp., 538 F.2d 1094, 1097-98 (5th Cir. 1976). *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974).

213. *See, e.g.*, DeMatteis v. Eastman Kodak Co., 520 F.2d 409, 411 (2d Cir. 1975); Ramos v. Port Authority, 12 CCH EMPL. PRAC. DEC. ¶ 11,035, at 4814 (S.D.N.Y. June

advisable for the parties to include a clause in the settlement agreement which states that the charging party has been fully informed of his rights under Title VII, including the right to file suit on his own behalf. The provision should indicate that the employee signs the agreement with the knowledge and understanding that by so doing he waives all rights to challenge further the respondent's alleged discriminatory employment practices and their effects upon him.

Fulfillment of the EEOC's statutory responsibility for attempting conciliation is a jurisdictional prerequisite to a lawsuit by that agency,[214] and only those issues which have been subject to the conciliation process may be raised in the EEOC suit.[215] The act requires the EEOC to make a genuine good faith effort at conciliation.[216] In this author's experience, however, employers frequently receive, on a take-it-or-leave-it basis, burdensome conciliation proposals which include substantial back pay, reporting, and affirmative action requirements. In such cases, the EEOC representative may simply ignore the employer's objections to his proposed conciliation agreement and treat the case as ripe for litigation.[217]

23, 1976); Padilla v. Stringer, 395 F. Supp. 495, 497-98 (D.N.M. 1974); Healen v. Eastern Airlines, Inc., 9 CCH Empl. Prac. Dec. ¶ 10,023, at 7237 (N.D. Ga. 1973).

214. The act provides that the EEOC can institute a lawsuit only when it "has been unable to secure from the respondent a conciliation agreement acceptable to the commission." 42 U.S.C. § 2000e-5(f)(1) (Supp. V, 1975). If the commission has not made a genuine effort to secure such an agreement, it cannot establish that it has been unable to fulfill the requirement. *See* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 869 (5th Cir. 1975); EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 947-48 (8th Cir. 1974); EEOC v. Canadian Indem. Co., 407 F. Supp. 1366, 1367 (C.D. Cal. 1976). The same requirement is applicable to a "pattern or practice" action brought by the EEOC under the provisions of 42 U.S.C. § 2000e-6(e) (Supp. V, 1975). EEOC v. United Air Lines, Inc., 10 CCH Empl. Prac. Dec. ¶ 10,271, at 5136 (N.D. Ill. 1975). The EEOC's failure to attempt conciliation is not, however, a bar to a suit brought by the charging party. Gamble v. Birmingham S.R.R., 514 F.2d 678, 688 (5th Cir. 1975); Jefferson v. Peerless Pumps Hydrodynamic Div., 456 F.2d 1359, 1361 (9th Cir. 1972); Johnson v. Seaboard Air Line Ry., 405 F.2d 645, 652 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969).

215 *See* EEOC v. General Elec. Co., 532 F.2d 359, 366 (4th Cir. 1976); Jiron v. Sperry Rand Corp., 9 CCH Empl. Prac. Dec. ¶ 9990, at 7126 (D. Utah 1975); Belcher v. Bassett Furn. Indus., Inc., 376 F. Supp. 593, 596-98 (W.D. Va. 1974).

216. EEOC v. Wagner Elec. Corp., 7 CCH Empl. Prac. Dec. ¶ 9245, at 7164 (E.D. Mo. 1973); EEOC v. Guaranty Sav. & Loan Ass'n, 369 F. Supp. 36, 38 (N.D. Ala. 1973); EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273, 275 (D. Md. 1973).

217. One court, recognizing that failure of conciliation is a prerequisite to an EEOC lawsuit, recently held that an employer who had suggested amendments to the EEOC's conciliation proposal had precluded formation of an agreement by failing to "unequivocally and totally" accept the commission's draft. EEOC v. Canadian Indem. Co., 407 F. Supp. 1366, 1367 (C.D. Cal. 1976). Such an unrealistic approach to the

A number of courts have held that they lacked authority to inquire into the extent of the EEOC's efforts at conciliation and were limited to a finding as to the *existence* of such efforts.[218] These courts have expressed apprehension that a judicial inquiry into the conciliation process would have a "chilling effect" on settlement negotiations.[219] This fear does not appear well-founded. Courts have been able to examine the good faith of negotiators under the National Labor Relations Act [220] and under the Railway Labor Act[221] without placing a chill on the ability of the parties to deal with one another. Deference should be paid to the settlement efforts of the EEOC because it is a federal agency, but that does not foreclose judicial review of its actions.[222] Since

settlement process is contrary to the intended purpose of the act and ignores the statutory requirement that the EEOC be "unable to secure" a conciliation agreement. 42 U.S.C. § 2000e-5(f)(1) (Supp. V, 1975). The suit was obviously premature because the parties had not completed their settlement efforts. Indeed, the court stayed proceedings for sixty days to enable the parties to continue to seek a settlement. 407 F. Supp. at 1368. The suit should have been dismissed without prejudice on jurisdictional grounds.

218. *E.g.*, EEOC v. Greyhound Lines, Inc., 411 F. Supp. 97, 102 (W.D. Pa. 1976); EEOC v. E.I. DuPont de Nemours & Co., 8 CCH Empl. Prac. Dec. ¶ 9793, at 6312 (W.D. Ky. 1974); EEOC v. Container Corp., 352 F. Supp. 262, 266 (M.D. Fla. 1972); *see* EEOC v. Rexall Drug Co., 9 CCH Empl. Prac. Dec. ¶ 9936 (E.D. Mo. 1974), in which the court, faced with a conciliation effort consisting of one telephone call, declared that it was "not disposed at this time to measure the extent of the Commission's conciliation efforts where some attempt at conciliation is in evidence." *Id.* at 6930. A bare allegation by the EEOC that all procedural prerequisites to institution of a lawsuit, including attempts at conciliation, have been satisfied is sufficient to survive a motion to dismiss. *See, e.g.*, EEOC v. Times-Picayune Pub. Corp., 500 F.2d 392 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); EEOC v. Wah Chang Albany Corp., 499 F.2d 187, 189 (9th Cir. 1974); EEOC v. Lutheran Hosp., 7 CCH Empl. Prac. Dec. ¶ 9205, at 7009 (E.D. Mo. 1974); *cf.* EEOC v. Otto, 12 CCH EMPL. PRAC. DEC. ¶ 11,154, at 5306 nn.9 & 11 (D. Md. Feb. 20, 1976).

219. *E.g.*, EEOC v. E.I. DuPont de Nemours & Co., 8 CCH Empl. Prac. Dec. ¶ 9793, at 6312 (W.D. Ky. 1974).

220. 29 U.S.C. §§ 151-69 (1970 & Supp. V, 1975); *see, e.g.*, NLRB v. Homes Tuttle Broadway Ford, Inc., 465 F.2d 717, 718 (9th Cir. 1972).

221. 45 U.S.C. §§ 151-63, 181-88 (1970); *see, e.g.*, Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570, 579 (1971).

222. At least two courts have made such a review. In one case the Fifth Circuit considered the employer's claim that the EEOC had failed to conciliate in good faith and held, without saying more, that "the charge of bad faith is simply not supported by the record." EEOC v. Louisville & N.R.R., 505 F.2d 610, 617 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975). In another case the district court made a finding of fact that "plaintiff EEOC failed to conciliate the EEOC charges of [the complainants] in good faith as required by Title VII." EEOC v. Datapoint Corp., 412 F. Supp. 406, 407 (W.D. Tex. 1976). *See also* EEOC v. St. Francis Community Hosp., 11 CCH Empl. Prac. Dec. ¶ 10,806 (D.S.C. March 3, 1976) (EEOC ordered to furnish certain documents and to answer certain interrogatories relating to the conciliation process); EEOC v. Humko Prods., 402 F. Supp. 1076, 1077 (W.D. Tenn. 1975) (hearing set on issue of EEOC compliance with conciliation provisions of act).

the EEOC's failure to attempt conciliation in good faith is a ground for dismissal of its complaint, it would seem to follow that the courts must assume responsibility for examining the bona fides of the commission's efforts when they are challenged by the defendants. Indeed, judicial review of conciliation efforts might well place added pressure on the parties to reach a settlement.

The judicial fear of chilling conciliation efforts by exposing them to public view apparently does not apply during the investigation phase where the employer's cooperation and candor is equally important. In *H. Kessler & Co. v. EEOC*,[223] the Fifth Circuit held that the charging party is entitled to access to the EEOC's investigative files regarding his charge, and that his attorney may review those files for the purpose of deciding whether litigation is warranted. Although Title VII prohibits the commission from making public any information gathered during its investigation, the court reasoned that the charging party was not a member of the public to whom the statute prohibits disclosure.[224] The EEOC cannot, of course, ensure that the charging party will refrain from disclosing the contents of the file to others.[225]

Publication, however limited, of the results of the commission's investigation certainly bears a potential for "chilling" conciliation efforts because it is likely to keep the employer from participating openly and freely during the investigation. If the employer is aware that every witness statement, every document, and every compilation of data may later be turned over to the charging party for potential use in litigation against him, he is likely to construct his responses to investigative inquiries in a manner suitable for a judge rather than for an investigator. As the Fifth Circuit held in *Kessler*, prior to its en banc reversal:

> We do not agree that limiting publication of information to the parties, as well as the general public, hinders the function or purpose of the statute. Rather, these portions of the Act are intended to insure that those directly involved in the conciliation process can fully and in good faith participate therein, uninhibited by any threat that their statements and actions will be released to anyone not otherwise privy thereto. Obviously, there are many times

223. 472 F.2d 1147 (5th Cir.) (en banc, twelve to four vote), *cert. denied*, 412 U.S. 139 (1973).

224. 42 U.S.C. §§ 2000e-5(b), -8(e) (Supp. V, 1975). After institution of a lawsuit, some restrictions on disclosure are lifted. *See* 42 U.S.C. § 2000e-8(e) (Supp. V, 1975); *cf.* Moseley v. General Motors Corp., 10 CCH Empl. Prac. Dec. ¶ 10,380 (E.D. Mo. 1975).

225. The EEOC admitted this fact to the trial court in the *Kessler* case. H. Kessler & Co. v. EEOC, 53 F.R.D. 330, 340 (N.D. Ga. 1971), *aff'd*, 468 F.2d 25 (5th Cir. 1972), *modified*, 472 F.2d 1147 (5th Cir. 1973), *cert. denied*, 412 U.S. 939 (1973).

> when the charging party may be the very person to whom a company most fears any pre-suit release of information. Had [the employer] not been apprehensive that the data it made available to the EEOC would in turn be surrendered to [the charging party] and improperly publicized by her, it is doubtful that the present suit would have intruded itself into the courts. And it was that apprehension, well-founded as we view the record, which has served to completely thwart the EEOC's *nonjudicial* investigative role, and has sabotaged any hope for "informal methods of conference, conciliation, and persuasion."[226]

This statement, now mooted, is quite persuasive and consistent with the efforts of the judiciary and of the EEOC to enhance the prospects of voluntary compliance with Title VII.

Significantly, the EEOC does not allow the *respondent* access to the investigative file until a law suit has been instituted by the charging party.[227] The EEOC disclosure policies are thus vulnerable to attack as disruptive of conciliation efforts on two grounds: (1) disclosure to the charging party encourages the respondent to be defensive and uncooperative; and (2) refusal to disclose to the respondent hinders him from making informed judgments regarding settlement.

Last Chance Notice

Under the EEOC's procedural regulations, the failure of conciliation efforts is shortly followed by notification to the respondent that settlement attempts have been terminated and will be resumed only upon respondent's written request.[228] Substantial controversy has arisen over whether the EEOC's failure to send this so-called "last chance" letter is a jurisdictional bar to its subsequent lawsuit. In *EEOC v. Hickey-Mitchell Co.*, [229] the Eighth Circuit affirmed the dismissal of an

226. 468 F.2d 25, 27 (5th Cir. 1972), *modified*, 472 F.2d 1147 (5th Cir. 1973), *cert. denied*, 412 U.S. 939 (1973).

227. CCH EEOC COMPLIANCE MANUAL § 83.5 (1976).

228. "Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the respondent shall be notified promptly, in writing, that such efforts have been unsuccessful and will not be resumed except upon the respondent's written request within the time specified in such notice." 28 C.F.R. § 1601.23 (1975). The commission has recently taken the position that this regulation applies only in the absence of any legitimate conciliation discussions between the parties. If such discussions are held without success, only the simple notification requirement of 29 C.F.R. § 1601.25 (1976) is applicable. EEOC v. Otto, 12 CCH EMPL. PRAC. DEC. ¶ 11,154, at 5302 (D. Md. Feb. 20, 1976). The court did not rule on that issue; rather, it held that because respondent had rejected all conciliation overtures the full notice was required. No other court seems to have limited section 1601.23 as the EEOC contends.

229. 507 F.2d 944 (8th Cir. 1974).

EEOC suit for failure to issue such a letter. The court held that "even the most uncooperative and recalcitrant respondent [has] 'the right to be told that it has one last chance to attempt conciliation.' "[230] The commission had claimed that the notice requirement was a mere technicality and that the employer had not been prejudiced by the omission. The court held that the regulation was not merely technical and that the EEOC had failed to prove that the employer suffered no prejudice.[231] In three other cases, the absence of prejudice to the employer was the decisive factor in the courts' refusal to dismiss EEOC suits based on the commission's failure to give the last chance notice.[232]

The last chance letter serves an important function. In many cases, an employer's first refusal to attempt conciliation is prompted by his distress over the reasonable cause finding. Without notice that he can reopen negotiations, he may believe that he has burned his bridges behind him by this initial reaction.[233] In other cases, the employer, thinking that he has made a conscientious effort to avoid discrimination and unaware that such an effort is irrelevant in the face of persistent

230. *Id.* at 948, *quoting* EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273, 276 (D. Md. 1973).

231. *Id.*; *accord*, EEOC v. Western Elec. Co., 382 F. Supp. 787, 796-97 (D. Md. 1974); EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273, 277 (D. Md. 1973).

232. In one of these cases, the Sixth Circuit found that the agency's omission was "harmless" because the employer had rejected an offer to conciliate a companion group of charges concerning "substantially identical issues of company practices." EEOC v. Kimberly-Clark Co., 511 F.2d 1352, 1360 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975). In another case, the commission had issued half the notice required by the regulation: it had notified the employer that conciliation attempts had been terminated and that a suit might be instituted, but it did not state that the employer's written request could reopen discussions. EEOC v. Raymond Metal Prods. Co., 530 F.2d 590 (4th Cir. 1976). The Fourth Circuit there held that the employer had not been prejudiced by the EEOC's incomplete notice, because (a) the commission's letter did not state that negotiations were no longer possible; (b) the company was advised that a lawsuit might follow; and (c) the company's lawyer conceded to the trial judge that the company had no desire to engage in conciliatory discussions. *Id.* at 596. Similar facts were before the Eighth Circuit and a similar result was reached in EEOC v. Laclede Gas Co., 530 F.2d 281 (8th Cir. 1976). The distinction between the two Eighth Circuit cases, *Hickey-Mitchell* and *Laclede*, is that in the former the EEOC sent no last chance notice at all, while in the latter, it sent a notice which was incomplete only by reason of its failure to inform the employer that it could reopen negotiations if it so desired. *See also* EEOC v. Otto, 12 CCH EMPL. PRAC. DEC. ¶ 11,154, at 5302-04 (D. Md. Feb. 20, 1976) (technical defect in last chance notice not ground for dismissal if no prejudice to employer *and* substantial compliance with regulation); EEOC v. Lithographers Local 2P, 10 CCH Empl. Prac. Dec. ¶ 10,293, at 5197 (D. Md. 1975).

233. The fact that an employer initially refused to engage in a conciliation discussion does not establish that the EEOC's subsequent failure to send the last chance notice was nonprejudicial. EEOC v. Raymond Metals Prods. Corp., 530 F.2d 590, 596 (4th Cir. 1976).

discrimination,[234] may sincerely believe that he has done all that he can. He may, therefore, refuse to do more until actually confronted with the threat of imminent litigation. Because of these considerations, failure of the EEOC to comply with its last chance regulation will, in many cases, deprive a respondent of a significant benefit. Accordingly, the EEOC should be held to strict compliance with the regulation. Moreover, if the presence or absence of prejudice to the respondent is to be the decisive factor in determining whether the EEOC's breach of regulation warrants dismissal of its suit, perhaps the EEOC should bear the burden of proving that the employer was not prejudiced by the commission's neglect.[235]

Once the time specified in the commission's last chance letter has expired without the respondent's seeking further conciliation discussions, the commission notifies the charging party that settlement efforts have failed and that he has ninety days within which to file a lawsuit.[236] The commission formerly sent the charging party two letters, one stating that conciliation had been unsuccessful and a later one informing him of his right to sue. However, the courts took divergent views on the question of which letter commenced the statutory limitation period,[237] and the EEOC abandoned the practice in favor of sending one letter.[238]

234. *See* Robinson v. Union Carbide Corp., 538 F.2d 652, 657 (5th Cir. 1976); Rowe v. General Motors Corp., 457 F.2d 348, 355-56 (5th Cir. 1972).

235. *See generally* EEOC v. Airguide Corp., 395 F. Supp. 600, 604 (S.D. Fla. 1975), *rev'd*, 539 F.2d 1038 (5th Cir. 1976), *citing* Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629, 634-35 n.25 (1974); *cf.* EEOC v. American Mach. & Foundry, Inc., 12 CCH EMPL. PRAC. DEC. ¶ 11,200, at 5525 (M.D. Pa. Aug. 26, 1976) (EEOC must carry burden of justifying delay in filing suit or laches will bar action).

236. 42 U.S.C. § 2000e-5(f)(1) (Supp. V, 1975). One court has held that a private plaintiff must file his suit within the statutory period allowed by the forum state for similar claims. If he fails to do so, his suit will be barred even though filed within ninety days of receiving the EEOC's right-to-sue notice. Clayton v. McDonnell Douglas Corp., 12 CCH EMPL. PRAC. DEC. ¶ 11,165 (C.D. Cal. Aug. 3, 1976). This holding is clearly erroneous because the federal statute of limitations preempts that of the state. *See* Cunningham v. Litton Indus., 413 F.2d 887, 890 (9th Cir. 1969). If the holding was correct, the EEOC, which often cannot even begin an investigation for many months after receiving the charge, would be reduced to a futile role.

237. *See* Garner v. E.I. DuPont de Nemours & Co., 538 F.2d 611, 614 (4th Cir. 1976) (numerous conflicting cases cited). *Compare* McGuire v. Aluminum Co. of America, 542 F.2d 43, 45 (7th Cir. 1976) (filing period commences when plaintiff receives right to sue letter), *with* Wong v. Bon Marche, 508 F.2d 1249, 1250 (9th Cir. 1975) (filing period commences with notice of right to sue), *and* DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 310-11 (2d Cir.), *modified*, 520 F.2d 409 (2d Cir. 1975) (filing period commences when commission notifies parties of failure of conciliation).

238. 2 CCH EMPL. PRAC. GUIDE ¶ 5318 (1975).

Confidentiality

An employer who has been the object of an EEOC investigation will probably wish to suppress public release of the discrimination charges and of the evidence uncovered by the investigation in order to avoid both damage to his business or reputation and a disadvantage with respect to other potential complainants. The employer is more likely to be candid and cooperative with the commission if confidentiality is assured. Accordingly, section 706(b) of Title VII prohibits the EEOC from publicly disclosing charges of discrimination and anything "said or done" during the commission's "informal endeavors" to resolve complaints.[239] In addition, section 709(e) of the act provides:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information.[240]

Courts have held that these statutory provisions do not bar the *charging party's* access to the EEOC's investigative file on his charge.[241] In addition, it has been held that a private plaintiff may obtain from the EEOC information developed during other investigations of the employer being sued which is "like or related" to the plaintiff's claims of discrimination, as long as references to specific individuals other than the plaintiff and to conciliation efforts are deleted.[242]

The EEOC has declared its willingness "to cooperate with private Title VII litigants and to lend appropriate assistance in framing proper court complaints. . . ."[243] This assistance includes disclosing case file information for use in "contemplated litigation."[244] Apparently, then, the EEOC's files are available to potential, as well as actual, plaintiffs. Section 709(e), however, prohibits the disclosure of such information

239. 42 U.S.C. § 2000e-5(b) (Supp. V, 1975).

240. 42 U.S.C. § 2000e-8(e) (1970).

241. H. Kessler & Co. v. EEOC, 472 F.2d 1147, 1152 (5th Cir.) (en banc), *cert. denied*, 412 U.S. 939 (1973); Mosley v. General Motors Corp., 10 CCH Empl. Prac. Dec. ¶ 10,380 (E.D. Mo. 1975).

242. National Elec. Contractors Ass'n v. Walsh, 12 CCH EMPL. PRAC. DEC. ¶ 11,116 (D.D.C. July 29, 1976); Mosley v. General Motors Corp., 10 CCH Empl. Prac. Dec. ¶ 10,380 (E.D. Mo. 1975).

243. CCH EEOC COMPLIANCE MANUAL § 83.7(c)(1) (1976).

244. *Id.* at § 83.3(a): "Information in case files may be disclosed provided that the request is made for the purpose of reviewing information in the case file in connection with pending or contemplated litigation." *See also* 29 C.F.R. §§ 1611.1-.14 (1975). Employer information *not* in a case file, such as the EEO-1 report, may also be disclosed. CCH EEOC COMPLIANCE MANUAL § 83.7(a) (1976).

"prior to the institution of any proceeding" under Title VII.[245] Furthermore, that section allows disclosure *only* when the new proceeding involves such information, but the EEOC's stated policy is to permit disclosure if the information concerns the same employer and would be relevant or probative in the private litigant's case.[246] Under the EEOC's broad definition of "relevant," a case file involving a charge of discrimination against Hispanics might be available to a plaintiff whose complaint alleged only discrimination against Blacks.[247]

Deference to the EEOC's interpretation of Title VII does not require acceptance of a construction contrary to the plain language of the act.[248] The mere fact that information in EEOC files would be useful to a private individual who is contemplating litigation does not warrant its disclosure under Title VII. Ultimately, such disclosure will also prove counterproductive because it compels respondents to adopt a more defensive posture in dealing with commission investigators. Although the EEOC requires that persons to whom case file information is revealed agree not to make the information public,[249] enforcement of that promise is complicated by first amendment rights and by the logistical problems associated with legal proceedings to enforce such a promise.

The EEOC has established regulations governing disclosure of its files pursuant to requests under the Freedom of Information Act (FOIA).[250] That statute does not authorize the release of material specifically exempted from disclosure[251] and provides criminal penalties

245. It is unclear from the statutory language whether "proceeding" means an EEOC charge or only a lawsuit, although use of the word "institution" would imply a legal proceeding. At least one court appears to have assumed that disclosure under section 709(e) is permitted only after litigation has begun. Mosley v. General Motors Corp., 10 CCH Empl. Prac. Dec. ¶ 10,380, at 5627 (E.D. Mo. 1975). *See also* H. Kessler & Co. v. EEOC, 472 F.2d 1147, 1151 n.3 (5th Cir.) (en banc), *cert. denied*, 412 U.S. 939 (1973). That interpretation is a logical one. A charging party acquires no discovery rights merely by filing his charge, and the EEOC, as part of its investigation, can review other files without disclosing the information contained therein to the new complainant. When the individual institutes his own suit, however, he bears the responsibility for discovery. Moreover, at that point the respondent's interest in confidentiality would not seem to require the protection necessary during EEOC conciliation efforts.

246. That position has received judicial approval. *See* National Elec. Contractors Ass'n v. Walsh, 12 CCH EMPL. PRAC. DEC. ¶ 11,116, at 5167 (D.D.C. July 29, 1976).

247. CCH EEOC COMPLIANCE MANUAL § 83.7(c)(2).

248. *See* General Elec. Co. v. Gilbert, 45 U.S.L.W. 4031, 4036 (U.S. Dec. 7, 1976); Fagan v. National Cash Register Co., 481 F.2d 1115, 1125-26 (D.C. Cir. 1973).

249. CCH EEOC COMPLIANCE MANUAL § 83.3(b) (1976).

250. 5 U.S.C. § 552 (1970); *see* 29 C.F.R. §§ 1611.1-.14 (1975).

251. 5 U.S.C. § 552(b)(3) (1970).

for obtaining records under false pretenses.[252] FOIA has been interpreted to accommodate the confidentiality provisions of Title VII, and requests for information pertaining to the commission's conciliation endeavors have been denied.[253] However, confidentiality is only required *prior* to institution of a legal proceeding under the act. Accordingly, one court has granted an application under FOIA for the disclosure of compliance reports submitted to the government by certain employers pursuant to a consent decree.[254]

A controversial facet of the confidentiality issue involves the ability of federal agencies other than the EEOC to release information which the EEOC itself could not release because of the proscriptions of Title VII. A number of federal agencies, including the Office of Federal Contract Compliance (OFCC) and the General Services Administration (GSA), customarily share information and file materials with the EEOC.[255] The "EEO-1" forms submitted to various government agencies are prepared by employers pursuant to EEOC regulations.[256] When a federal contractor is charged with a violation of Title VII, the commission customarily obtains a copy of the affirmative action report which that contractor filed under OFCC regulations.[257] Similar reports are required of government contractors under GSA regulations.[258] Despite this agency interaction, it has been held that an employer's EEO-1 forms and affirmative action plans are not exempt from disclosure by

252. *Id.* at § 522a(i)(1) (Supp. V, 1975). The EEOC regulations incorporate such penalties. 29 C.F.R. § 1611.12 (1970).

253. *See, e.g.*, Parker v. EEOC, 534 F.2d 977, 978 (D.C. Cir. 1976) (denying request for copies of all predetermination settlement agreements and conciliation agreements executed by EEOC Philadelphia office).

254. United States v. Trucking Employers, Inc., 11 CCH Empl. Prac. Dec. ¶ 10,791 (D.D.C. Apr. 5, 1976).

255. *See, e.g.*, Memorandum of Understanding Between EEOC & OFCC, September 11, 1974, 1 CCH EMPL. PRAC. GUIDE ¶ 3780. This memorandum has received judicial approval insofar as it allows the OFCC to transfer employer reports and data to the EEOC. Reynolds Metals Co. v. Rumsfeld, 12 CCH EMPL. PRAC. DEC. ¶ 11,122 (E.D. Va. July 27, 1976). The EEOC's published position is that it will not disclose information obtained from the OFCC but will refer the party requesting such information to that agency. CCH EEOC COMPLIANCE MANUAL § 83.7(b) (1976).

256. EEOC regulations require each employer of more than one hundred persons to file an information report (EEO-1) which includes a breakdown of all his employees by race, sex and job classification. 29 C.F.R. § 1602.7 (1975); 1 CCH EMPL. PRAC. GUIDE ¶ 1881 (1976).

257. The OFCC requires each employer with fifty or more employees and a government contract of $50,000 or more to develop and implement affirmative action programs aimed at increasing minority utilization. 41 C.F.R. §§ 60-1.40, -2.1 to -2.32 (1976).

258. 41 C.F.R. § 1-12.800 to .814 (1976).

agencies other than the EEOC merely because, under Title VII, the EEOC itself could not have released them.[259] In such cases, however, other FOIA provisions offer protection to the employer. For example, the statute does not compel disclosure of matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[260] Thus, it has been held that those portions of an employer's EEO-1 reports and affirmative action plans containing labor data which might give competitors an unfair advantage cannot be revealed by government agencies with which they have been filed.[261]

The fact that information is in the hands of an agency other than the EEOC should not be controlling on the question of disclosure, because the congressional purpose in requiring confidentiality should not be so easily defeated. While the Supreme Court has not yet spoken on this issue, one Justice has had the opportunity to convey his individual thoughts. In *Chamber of Commerce v. Legal Aid Society*,[262] Justice Douglas, sitting alone, denied a stay of a district court's discovery order

259. Sears, Roebuck & Co. v. GSA, 509 F.2d 527, 529 (D.C. Cir. 1974); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974). The data involved in these cases was supplied to the agencies pursuant to regulations which do not prohibit disclosure. Sears, Roebuck & Co. v. GSA, *supra* at 528; Hughes Aircraft Co. v. Schlesinger, *supra* at 294.

260. 5 U.S.C. § 552(b)(4) (1970). It does not appear that an employer could bring an action under FOIA to prevent the agency from disclosing data *prior* to the agency's decision to disclose the information. When that decision is announced the employer could seek judicial review of the agency's action under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970). *See* Associated Dry Goods Corp. v. EEOC, 12 BNA Fair Empl. Prac. Dec. 1729 (E.D. Va. 1976). If the EEOC has threatened to release data to be provided to it pursuant to a subpoena issued under Title VII, an employer might be able to challenge the subpoena on the ground that the threatened disclosure would violate Title VII. *Id.* The EEOC rarely informs a respondent of its intention to disclose file material. An argument could be made that this policy is unconstitutional as a violation of due process because the respondent is denied a property right without a hearing. *See* Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 178-79 (D. Del. 1976).

261. Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 176 (D. Del. 1976); Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249 (E.D. Va. 1974), *aff'd*, 12 CCH EMPL. PRAC. DEC. ¶ 11,208 (4th Cir. 1976). *See also* Sea-Land Services, Inc. v. Morton, 11 CCH Empl. Prac. Dec. ¶ 10,792, at 7333 (D.D.C. Feb. 6, 1976). In *Sea-Land* the court ordered the deletion of individual names and salaries, of reasons for termination, and of specific employment test titles while permitting disclosure of an employer's affirmative action plan. *Id.* The existence of commercial disadvantage is a question of fact. Disclosure will not be barred if the employer fails to establish such disadvantage. *See* United States v. Trucking Employers, Inc., 11 CCH Empl. Prac. Dec. ¶ 10,791 (D.D.C. Apr. 5, 1976); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 296-98 (C.D. Cal. 1974).

262. 423 U.S. 1309 (1975).

requiring the GSA to disclose certain EEO-1, affirmative action, and compliance reports in its possession. Although the stay was denied for lack of provable irreparable injury, Justice Douglas expressed substantial concern regarding the merits of the case, because the EEOC was authorized to obtain the information in question and would have been prohibited from disclosing it by Title VII. He wrote:

> To be sure, the information in the AAP's and the EEO-1's in this case was not obtained directly by the EEOC. Rather, the information was apparently collected by a Joint Reporting Committee of both the EEOC and the federal compliance agency (in this case, GSA) under Executive Order No. 11246. But the information in the EEO-1's was obtained, in part, on behalf of the EEOC, see 41 CFR §60-1.7(a)(1), and much of the information contained in the AAP's is essentially in the nature of that protected by §709. Indeed, certain policy considerations underlying the regulations precluding release by the GSA of information contained in the AAP's are akin to those motivating the confidentiality implemented by §709. In view of the foregoing, though some of the information involved here neither was obtained, nor is to be disclosed, by the EEOC, the congressional purpose of confidentiality, protected by criminal sanctions, is not to be lightly circumvented.[263]

Conclusion

It has been said that the EEOC's proceedings are "purely nonadversary"[264] and, in the sense that the agency can only investigate and conciliate but cannot adjudicate, that statement is technically accurate. As a practical matter, however, the EEOC lost its right to claim neutrality when the 1972 amendments to Title VII were enacted. The EEOC still cannot adjudicate, but it can litigate, and the employer who fails to appreciate that fact during the investigative process will regret it in court. Moreover, even when the commission decides not to institute its own suit,[265] it may lend assistance to other potential plaintiffs, including providing access to relevant case files.[266] Such plaintiffs might include civil rights groups and other class representatives who received, in the 1972 amendments to the act, the right to file charges on behalf of persons claiming to be aggrieved.[267]

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263. *Id.* at 1311-12.

264. EEOC v. General Elec. Co., 532 F.2d 359, 370 (4th Cir. 1976).

265. The commission has sufficient resources to institute actions in only about 10% of the cases in which conciliation efforts are unsuccessful. *See* BNA EEOC COMPLIANCE MANUAL, SUMMARY OF LATEST DEVELOPMENTS No. 7 (Aug. 6, 1976).

266. See notes 242-46 & accompanying text *supra.*

267. 42 U.S.C. § 2000e-5(b) (Supp. V, 1975). *See, e.g.*, Wisconsin Nat'l Org. for Women v. Wisconsin, 12 CCH EMPL. PRAC. DEC. ¶ 11,140 (W.D. Wis. July 30, 1976);

Under Title VII, the employer is exposed to substantial liability at the hands of one or more of these potential plaintiffs, and the foundation for such exposure is laid during the EEOC investigation of the charge of discrimination. The contents of the investigative file may well determine the decision of the commission and other possible plaintiffs on whether to file suit against a particular employer. The employer who wishes to minimize the likelihood that his company will be selected for litigation must seek to (a) limit the scope of the commission's investigation, (b) assert his procedural rights, and (c) recognize circumstances warranting an early effort at settlement. The employer must also be prepared to take the initiative when necessary to complete the investigative file. Convincing an inexperienced paraprofessional investigator that the charge of discrimination is groundless will not be useful, and may be counterproductive, if the investigator's more experienced supervisor remands the case for further processing. The employer will thus often benefit from submitting data not requested by the investigator but probative of the employer's position. For example, figures showing minority hiring for the previous two years may establish a better overall picture than similar data for the preceding twelve months, and the employer would be well advised to submit the former statistics even though the investigator requested only the latter. Similarly, the employer from whom hiring statistics have been requested may benefit from providing a list of minority promotions as well. In addition, a document indicating the minority percentages of all plants in the state may be preferable to one showing only the plant in which the charging party was employed.

Assuming the initiative in this manner requires the employer to perform his own investigation of a charge prior to that conducted by the EEOC. The time consumed by such an effort is justified by the exposure to liability. Given the fact that the EEOC typically notifies the employer of the charge months before the investigation begins, the employer should have ample opportunity to complete his own review of the facts. This review may convince the employer that the charging party was in fact treated unfairly and he may wish to seek a predetermination settlement with the commission. Although the EEOC's published position is that such a settlement cannot be entered into prior to a preliminary investigation,[268] the willingness of the employer to reach

League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Cal. 1976).

268. 29 C.F.R. § 1601.19a (1975); CCH EEOC COMPLIANCE MANUAL § 61.3 (1976). The respondent also has the right, recognized by the commission, to deal

such an agreement, expressed *prior* to the start of the investigation, will in most cases have a substantial limiting effect on the scope of the EEOC effort.

The employer may also prepare for confrontations with the EEOC long before a charge is filed by maintaining records and statistics on utilization of minorities in his work force. Such records are not required but are recommended by the EEOC.[269] Their availability in the event of a discrimination charge could hasten considerably a favorable completion of the investigation. The defensive employer should maintain the following records, in addition to personnel records on incumbent employees: (1) job descriptions stating the duties and hiring standards for each position; (2) applicant flow data, including the visible group characteristics of each applicant, whether or not he completes an application form;[270] (3) interview reports, indicating the interviewer's reasons for rejection or acceptance of all applicants; (4) the results of any employment tests administered to job applicants;[271] (5) written explanations of decisions to promote, transfer, layoff, recall, discipline, or discharge; and (6) payroll statistics showing the date of

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personally with the charging party in an attempt to settle the charge. EEOC Dec. No. 70-547, CCH EEOC Dec. ¶ 6123 (1973).

269. 29 C.F.R. § 1602.12, .13 (1975). Personnel records must be maintained for six months after they are made, and for six months after an employee is involuntarily terminated. If a discrimination charge is filed, the records must be preserved until final disposition of the charge. *Id.* § 1602.14 (1975).

270. In one case, an employer successfully defended an action alleging discrimination against Mexican-Americans by introducing into evidence applicant flow statistics showing that the percentage of job applicants hired was greater with respect to Mexican-Americans than to any other racial or ethnic group. Ochoa v. Monsanto Co., 335 F. Supp. 53, 56, 59 (S.D. Tex. 1971), *aff'd*, 473 F.2d 318 (5th Cir. 1973); *see* Schneider, *The Unprotected Minority: Employers and Civil Rights Compliance*, 49 L.A.B. BULL. 458, 487 (1974). *See also* Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108, 1115-16 (N.D. Ala. 1972). *But see* Jones v. Tri-County Elec. Coop., 512 F.2d 1, 2-3 (5th Cir. 1975).

271. The EEOC's broad definition of "test" includes "all formal, scored, quantified or standard techniques of assessing job suitability including . . . specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc." 29 C.F.R. § 1607.2 (1975). *See generally* Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975) (evaluation of applicant's criminal record); Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974) (consideration of garnishments); Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972) (arrest record). All tests which have an adverse impact on the hiring of a minority or ethnic group must be validated to establish a correlation with successful job performance. *See* 29 C.F.R. §§ 1607.3-.8 (1975); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

hire and the salary of all employees. If possible, these records should be a determination maintained for two or three years because EEOC investigations often take that long to complete.[272]

In sum, the best way to avoid litigation under Title VII is to obtain a determination of "no reasonable cause" from the EEOC.[273] To enhance that possibility, the employer must be prepared at an early stage in the investigation to provide the EEOC representative with the evidence he needs to recommend a decision favorable to the employer. The employer simply cannot afford to be a passive conduit of data requested by the commission when his employment practices are challenged. Circumstances require that he assume a more active role. It is far less expensive to justify one's employment practices to an EEOC representative investigating a single charge of discrimination than it is to defend those same practices before a United States district judge in a class action.

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272. 9 EEOC ANN. REP. 2 (1974).

273. A finding of reasonable cause is a prerequisite to suit by the EEOC. EEOC v. Westvaco Corp., 372 F. Supp. 985, 991-92 (D. Md. 1974). It is not a prerequisite to a private action. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973). However, a negative finding will tend to discourage such a suit. Obtaining a "no cause" finding is not an easy task. In the EEOC's 1974 fiscal year, only 36% of the determinations were "no cause". 9 EEOC ANN. REP. 47 (1974).